109-117

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~323.~~ 78

THE DOUBLE-POINTED TACK COMPANY,
APPELLANT,

vs.

THE TWO RIVERS MANUFACTURING COMPANY,
JOSEPH MANN & HENRY MANN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED DECEMBER 8, 1880.

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1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA, *Eastern District of Wisconsin.* } *ss:*

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held according to law at the city of Milwaukee in said district, on the first Monday (being the fifth day) of January, A. D. 1880. Present, the Honorable Charles E. Dyer, district judge, presiding; Henry Fink, marshal, and Edward Kurtz, clerk of said court.

Among other, the following proceedings were had, to wit:

THE DOUBLE-POINTED TACK COMPANY, Complainant,
vs.
THE TWO RIVERS MANUFACTURING COMPANY, JOSEPH MANN and HENRY MANN, Defendants. } In Equity.

Be it remembered that heretofore, to wit: on the 4th day of November, A. D. 1878, came the above-named complainant by its solicitors, Messrs. Murphey, Goodwin and Mitchell, and filed its bill of complaint against the defendants, Joseph Mann and Henry Mann, as follows:

Bill of Complaint.

Circuit Court of the United States for the Eastern District of Wisconsin.

2 DOUBLE-POINTED TACK COMPANY
vs.
MANN BROTHERS,
JOSEPH MANN and HENRY MANN, } In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Wisconsin:

The Double-Pointed Tack Company, a corporation duly incorporated under the laws of the State of New York, and doing business at the city of New York, county and State of New York, brings this its bill of complaint against Joseph Mann and Henry Mann individually and collectively, both being residents of Milwaukee, State of Wisconsin, and doing business under the firm, name and style of Mann Brothers, at Milwaukee, Wisconsin, and being, as your orator is informed and believes, citizens of Wisconsin, and thereupon your orator complains and says, that one, Purches Miles, was and is the original and first inventor of a new and useful improvement in bail-ears, fully described in the letters-patent hereinafter mentioned, and which

had not been known or used before said Purches Miles' said invention and which was not for more than two years before his application for a patent, as hereinafter mentioned, in public use or on sale with his consent or allowance.

3 And your orator further shows unto your honors that the said Purches Miles, by an assignment in writing, sold assigned and transferred unto your orator, the Double-Pointed Tack Company, all his the said Purches Miles' right, title and interest in and to said invention and the letters-patent when granted therefor, and requested the Commissioner of Patents to issue such letters-patent to your orator the said Double-Pointed Tack Company, as assignee of said Miles, which said assignment was duly recorded in the Patent Office of the United States.

And your orator on information and belief further shows unto your honors that said Purches Miles being so as aforesaid the first inventor and discoverer of said improvement in bail-ears, and having assigned all his right thereto to your orator, your orator did, on the 10th day of February, 1874, upon due application therefor, obtain letters-patent of the United States for said invention, in due form of law, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents of the United States, bearing date the day and year last aforesaid and numbered 147,343, whereby there was granted and secured to your orator, as assignee of said Purches Miles, and to your orator's successors or assigns, or intended so to be, for the term of seventeen years from and after the date of said letters-patent, the

4 full and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention and improvement as set forth in said letters-patent, which, or a duly certified copy of which, is ready here in court to be produced; and by virtue whereof your orator became and now is the sole owner of all the rights and privileges granted and secured, or intended to be granted and secured, in and by said letters-patent.

And your orator further shows unto your honors that by virtue of the premises, your orator became and now is the sole and exclusive owner of said letters-patent, and the inventions and improvements described therein, and of all the rights and privileges granted and secured, or intended to be granted and secured, thereby; and that your orator has invested and expended large sums of money and has been to great trouble in and about said invention and for the purpose of carrying on the business of manufacturing bail-ears and making the same profitable to itself and useful to the public; and that said invention has been and is of great benefit and advantage and that large quantities

of bail-ears and pails provided with bail-ears were made according to said invention, and sold by your orator to the great advantage of the public; and that the public have generally acknowledged and acquiesced in the aforesaid rights of your orator, and your orator believes that it will realize and receive large gains and profits therefrom, if infringements by said defendants and their confederates shall be prevented.

Yet the said defendants, well knowing the premises and the rights secured to your orator as aforesaid, but contriving to injure your orator and to deprive it of the benefits and advantages which might and otherwise would accrue unto your orator from said invention, did, ever after the issuing of the said letters patent as aforesaid, and before the commencement of this suit, as your orator is informed and believes, without the license or allowance and against the will of your orator, and in violation of its rights and in infringement of the aforesaid letters patent, at the city of Milwaukee, Wisconsin, and other places, unlawfully and wrongfully, and in defiance of the rights of your orator, make, construct, use, and vend to others to be used, the said invention, and did make, construct, use, and vend to others to be used, bail-ears and pails provided with bail-ears made according to and employing and containing said invention; and that the said defendants and their confederates still continue so to do; and that they are threatening to make the aforesaid bail-ears and pails provided with bail-ears in large quantities, and to supply the market therewith, and to sell the same. All in defiance of the rights acquired by and secured to your orator as aforesaid, and to its great and irreparable loss and injury, and by which your orator has been and still is being deprived of great gains and profits which it might and otherwise would have obtained, but which have been received and enjoyed, and are being received and enjoyed, by the said defendants, by and through their aforesaid unlawful acts and doings.

And your orator further shows unto your honors, on information and belief, that said defendants have made and sold, and caused to be made and sold, large quantities of said bail-ears and pails provided with bail-ears, and have a large quantity on hand which they are offering for sale, and have made and realized large profits and advantages therefrom; but to what extent and how much exactly, your orator does not know, and prays a discovery thereof.

And your orator says that the use of the said invention by said defendants, and their preparation for and avowed determination to continue the same, and their other aforesaid unlawful acts, in disregard and defiance of the rights of your orator, have the effect to and do encourage and induce others to venture to infringe said patent, in disregard of your orator's rights.

And your orator further shows unto your honors that your orator has caused notice to be given to said defendants of said infringements, and of the rights of your orator in the premises, and requested them to desist and refrain therefrom; but said defendants disregarded said notice, and refused to desist from said infringements, and still continue to make and sell said bail-ears and pails provided with bail-ears without right.

And your orator prays that said defendants Joseph Mann and Henry Mann, and their firm of Mann Brothers, and their and each of their servants, agents, atttorneys and workmen, and each and every of them, may be restrained and enjoined provisionally and perpetually by the order and injunction of this honorable court, from directly or indirectly making, constructing, using, vending, delivering, working or putting into practice, operation or use, or in anywise counterfeiting or imitating the said invention or any part thereof, or any bail-ears or pails provided with bail-ears, made in accordance therewith, or like or similar to those which the said defendants have heretofore
8 made; and that the said defendants may be decreed to pay the profits unlawfully obtained by them by reason of the aforestated infringement, and the damages thereby suffered by your orator, and the costs of this suit; and that your orator may have such further relief or such other relief as to this honorable court shall seem meet, and as shall be agreeable to equity.

And for as much as your orator can have no adequate relief except in this court, to the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief prayed, and may upon their and each of their corporal oaths and according to their best and utmost knowledge, remembrance, information and belief, full, true, direct, and perfect answers make to the premises, and to all the several matters hereinbefore stated and charged, as fully and particularly as if severally and separately interrogated as to each and every of said matters, and may be compelled to account for and pay to your orator the profits by them acquired, and the damages suffered by your orator, from the aforesaid unlawful acts.

May it please your honors to grant unto your orator
9 the suit of injunction, as well provisional as perpetual, issuing out of and under the seal of this honorable court, commanding, enjoining, and restraining the said defendants, Joseph Mann and Henry Mann, and their firm of Mann Brothers, and their and each of their servants, agents, attorneys, and workmen, and each and every of them, as is hereinbefore in that behalf prayed.

May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court, directed to the said defendants Joseph Mann and Henry

Mann, and their firm of Mann Brothers, commanding them by a certain day, and under a certain penalty, to be and appear in this honorable court, then and there to answer the premises and to stand to and abide such order and decree as may be made against them.

And your orator will ever pray, &c.

DOUBLE-POINTED TACK CO.,
HENRY W. PUTNAM,
President and Treasurer.

MURPHEY, GOODWIN, AND MITCHELL,
Complainant's Solicitors.

A. v. BRIESEN, *of Counsel.*

UNITED STATES OF AMERICA, }
Southern District of New York. } *ss:*

On this twelfth day of October, 1878, before me personally appeared Henry W. Putnam, who by me being first duly sworn, deposes and says, that he is the President and Treasurer of the Double-Pointed Tack Company, the above-named complainant; that he has read the foregoing bill of complaint subscribed by him in the name of the said Double-Pointed Tack Company and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true, and that he verily believes that Purches Miles, named in the foregoing bill of complaint, is the first, original, and sole inventor of the improvement in bail-ears described and claimed in the letters-patent referred to in said bill of complaint.

WILLIAM A. ROOT, [SEAL,]
Notary Public, No. 146, *New York County.*

And same day (November 4, 1878,) the complainant by its solicitors entered in the order and rule book an order that said defendants show cause by Thursday, the 7th day of November inst., at 10 o'clock in the forenoon, why an injunction should not be issued according to the prayer of the bill on file, and also filed affidavit of Henry W. Putnam in support of said application. Whereupon a subphœna issued returnable the first Monday of December next, as follows:

UNITED STATES OF AMERICA, }
Eastern District of Wisconsin. }

[SEAL.] The President of the United States of America, to Joseph Mann and Henry Mann, greeting:

You are hereby commanded, that you personally appear be-

fore the judges of the circuit court of the United States of America, for the eastern district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of December next ensuing, at Milwaukee, to answer to a bill of complaint, exhibited against you, in our said court, by The Double-Pointed Tack Company.

And to do further, and to receive what our said court shall have considered in that behalf:—and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said Joseph Mann and Henry Mann, if to be found in his district, and due return thereof make.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this fourth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, and of our independence the one hundred and third.

EDWARD KURTZ, *Clerk.*

MURPHEY, GOODWIN & MITCHELL, *Solicitors.*

It is ordered by our said court that the said Joseph Mann and Henry Mann, the defendants aforesaid, do enter their appearance in this suit in the clerk's office, on or before the day and time at which this subpœna is returnable as aforesaid; otherwise, the bill filed may be taken as confessed. And it is further ordered that they show cause by Thursday, the seventh day of November, instant, at ten o'clock in the forenoon, why an injunction should not be issued, according to the prayer of the bill on file.

Subpœna returned: "Served on the within-named Jo-
12 seph Mann and Henry Mann, at Milwaukee, by delivering to each of them personally a copy of this subpœna, this 4th day of November, A. D. 1878. Henry Fink, marshal, by W. A. Nowell, deputy." Fees $4.72.

November 19, 1878. This day came the complainant, by its solicitors, and filed amendments to the bill of complaint making the Two Rivers Manufacturing Company a defendant thereto, as follows:

Amendments to Bill of Complaint.

Circuit Court of the United States for the Eastern District of Wisconsin.

DOUBLE-POINTED TACK COMPANY
vs.
HENRY MANN *et al.*
} In equity.

And now comes the above-named plaintiff, before a copy of

the bill filed herein has been ordered by the defendant, and amends said bill of complaint, as follows:

Add after the words "citizens of Wisconsin," on the first page, the following: "And the Two Rivers Manufacturing Company, a corporation duly created by act of the legislature of the State of Wisconsin, entitled 'An act to incorporate the Two Rivers Manufacturing Company,' approved March 11th, 1871, and a citizen of the State of Wisconsin."

13 Add on page seven, after the words, "And your orator prays that said defendants, Joseph Mann and Henry Mann," the words, "and the said the Two Rivers Manufacturing Company."

Add after the words, "their firm of Mann Brothers," on the last page of said bill, where they first occur, the words, "and the said the Two Rivers Manufacturing Company."

And add after the same words, where they last occur on said page, the words, "and the said the Two Rivers Manufacturing Company."

MURPHEY, GOODWIN & MITCHELL,
Solicitors for Complainant.

A. v. BRIESEN, *of Counsel.*

Endorsed as follows: Service of copy admitted Nov. 19, 1878. Finches, Lynde & Miller, defendants' solicitors.

And same day, (November 19, 1878,) the complainant, by its solicitors, entered in the order and rule-book an order that said defendant, the Two Rivers Manufacturing Company, show cause by Monday, the 25th day of November, inst., at ten o'clock a. m., why an injunction should not be issued according to the prayer of the bill as amended. Whereupon a subpœna issued, returnable the first Monday of January next, as follows:

14 UNITED STATES OF AMERICA, }
Eastern District of Wisconsin. }

The President of the United States of America, to The Two [SEAL.] Rivers Manufacturing Company, impleaded with Joseph Mann and Henry Mann, greeting:

You are hereby commanded, That you personally appear before the judges of the circuit court of the United States of America, for the eastern district of Wisconsin, in our court of chancery, in and for the district aforesaid, on the first Monday of January, next ensuing, at Milwaukee, to answer to a bill of complaint, exhibited against you in our said court, by the Double-Pointed Tack Company.

And to do further, and to receive what our said court shall

have considered in that behalf:—and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said The Two Rivers Manufacturing Company, if to be found in his district, and due return thereof make.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this, nineteenth day of November, in the year of our Lord one thousand eight hundred and seventy-eight, and of our independence the one hundred and third.

EDWARD KURTZ, *Clerk.*

MURPHEY, GOODWIN & MITCHELL, *Solicitors.*

It is ordered by our said court that the said The Two Rivers Manufacturing Company, the defendant aforesaid, do enter its appearance in this suit in the clerk's office, on or before the day and time at which this subpœna is returnable as aforesaid; otherwise, the bill filed may be taken as confessed. And it is further ordered that it show cause by Monday, the twenty-fifth day of November, instant, at ten o'clock in the forenoon, why an injunction should not be issued, according to the prayer of the bill on file.

15 Subpœna returned: "Served on the within-named defendant, The Two Rivers Manufacturing Company, by delivering a copy of this subpœna to Joseph Mann, secretary thereof, at Milwaukee, this 20th day of November, A. D. 1878. Henry Fink, marshal, by W.A. Nowell, deputy." Fees $2.36.

November 27, 1878. "We, the undersigned, hereby enter our appearance as solicitors for the defendants in the above-entitled cause. FINCHES, LYNDE & MILLER,

"*Defendants' Solicitors.*"

December 9, 1878. This day came the parties by their counsel, Mr. Murphey appearing for the complainant, and Mr. Lynde for the defendants, and the motion of the complainant for an injunction came on to be heard, and was argued by said counsel; and being concluded the court took the same under consideration.

January 4, 1879. This day came the defendants, by their counsel, and on their motion it is ordered by the court that the complainants file security for costs within twenty days in the sum of two hundred and fifty dollars.

January 6, 1879. This day came the defendants, by their solicitors, and filed their answer, as follows:

16 *Answer.*

Circuit Court of the United States, Eastern District of Wisconsin.

THE DOUBLE-POINTED TACK COMPANY
vs.
THE TWO RIVERS MANUFACTURING COMPANY, JOSEPH MANN and HENRY MANN. } In Equity.

The joint and several answer of The Two Rivers Manufacturing Company, Joseph Mann and Henry Mann to the bill of complaint herein.

The defendants herein, saving and reserving to themselves all and all manner of exception to the manifold errors in the said bill of complaint contained, for answer thereto or to such part thereof as they are advised is material for them to answer unto, answer and say:

That they are informed and believe and upon such information and belief allege it to be true that the said Purches Miles in said bill of complaint mentioned was not the original and first inventor of the improvement in bail-ears, nor was he the original and first inventor of the special device, contrivance, or mechanism described in and intended to be covered by the letters patent in said bill of complaint referred to; but, on the contrary thereof, these defendants upon information and belief as aforesaid expressly deny that said device, contrivance, or mechanism
17 or any substantial or material part thereof, was new at the time of the pretended invention thereof by the said Purches Miles. And these defendants, further answering, admit that the said Purches Miles, although not the original and first inventor of said alleged improvement, but falsely and fraudulently claiming to be such, did, on or about the 10th day of February, 1874, upon an application by him previously made to the Commissioner of Patents of the United States therefor, obtain letters patent of the United States for said pretended invention and improvement; that said letters were in due form, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior and countersigned by the Commissioner of Patents, and bearing date the day and year aforesaid, whereby it was attempted to grant and secure unto the said Purches Miles, his heirs, administrators, and assigns, for the term of seventeen years from the date thereof, the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said compound staple-fastening or pretended improvement in said letters patent, and the schedule thereto attached, described; and the said pretended invention is entitled in said schedule "Improvement in bail-ears."

18 And these defendants, further answering, upon informa-

tion and belief, expressly deny that the said device, contrivance, or mechanism described in said letters patent, and schedule thereunto attached, so issued to the said Purches Miles as aforesaid, or any material or substantial part thereof, was new, or that the same had not been known and used at and prior to the time of the alleged invention thereof by the said Purches Miles; on the contrary thereof, these defendants, upon like information and belief, insist and state the fact to be that the same, and the material and substantial parts thereof, were well known and publicly used long prior to the pretended invention thereof by the said Purches Miles; that the said device, contrivance, and mechanism, and the material and substantial parts thereof, were known and in general public use in the Ward Company's foundry in Youngstown, Ohio, long prior to the alleged invention of the said Purches Miles, and that the same was so known and used at the said foundry by John G. Kuechbaum, Cornelius Miller, Henry Winterbauer, who reside at Youngstown, in the State of Ohio, as these defendants are informed and believe, as early as 1867; also

19 that the said invention and discovery, and the same principle and combination, or substantial and material parts thereof, patented in and by the letters patent mentioned in the bill of complaint aforesaid, was in public use in the United States in Marlboro', in the State of New Hampshire, and that the same was so known and used by Wm. Collins, Charles Buss, and Daniel W. Tenny, who resided in said town of Marlboro' as early as 1861; also that the said invention and discovery, and the same principle and combination or substantial and material parts thereof, patented in and by the latters patent mentioned in the bill of complaint aforesaid, was in public use in the United States in the city of Brooklyn, in the State of New York, and that the same was so known and used by Jonathan Walton, who resides in the said city of Brooklyn, as early as January, 1865, and had been in such use in each and all of said places for more than two years before the 11th day of November, 1873, the date of the alleged application of Purches Miles for the aforesaid patent.

These defendants further answering say, that they are informed and believe it to be true that the said invention and discovery and the same principle and combination or substantial and material

20 parts thereof patented in and by the letters patent mentioned in the bill of complaint aforesaid, was on sale in the United States, at Youngstown, in the State of Ohio, by the said John G. Knichbaum, as early as January, 1868, and has been on sale as aforesaid for more than two years before the 11th day of Nov ember, 1873, the date of the alleged application of Purches Miles, the patentee aforesaid for a patent therefor.

And these defendants further answering say, that they are informed and believe it to be true, that the said Purches Miles,

patentee as aforesaid, was not the original and first inventor and discoverer of said invention and discovery, or of any material and substantial part of the thing or of the principle in combination patented in and by the letters patent mentioned in the said bill of complaint, but that the same thing and the same principle and combination or substantially the same had been previously combined by and invented by one Alfred Miller, who resided at Cincinnati, in the State of Ohio, and that the same thing was known to and combined by said Alfred Miller, and the same was known to John Cooling, Henry Miller, Henry Carrol, Francis Heim, Samuel Donnelly, James Galliger, Michael Corbett, and Andrew B. Lewis, Jr., all of whom resided in the city of Cincinnati, as early as the first of October, 1872, and prior to the time
21 when it is alleged in the said bill of complaint that the same was invented and discovered by Purches Miles, patentee as aforesaid; also the same thing and the same principle and combination or substantially the same had previously been combined by and invented and discovered by one Jonathan Walton, who resided at Brooklyn, in the State of New York, and that the same was known to and combined by the said Jonathan Walton, as early as 1865, and that a patent was duly issued to the said Jonathan Walton therefor from the Patent Office, at Washington, dated May twelfth (12), 1868, and numbered 77,853, and prior to the time when it is alleged in the said bill of complaint, the same was invented and discovered by Purches Miles, patentee as aforesaid; also the same thing and the same principle and combination or substantially the same had been previously combined by and invented and discovered by one John G. Knichbaum, who resided at Youngstown, State of Ohio, and that the same was known to and combined by said John G. Knichbaum, as early as the month of January, 1868, and that a patent was duly issued to the said Knichbaum therefor from the Patent Office at Washington, dated the 4th day of May, A. D. 1869, and numbered 89,666, and prior to the time when it is alleged
22 in the said bill of complaint the same was invented and discovered by the said Purches Miles, the patentee as aforesaid; also that the same thing and the same principle and combination or substantially the same had been previously combined by, and invented and discovered by one William Collins, who resided at Marlboro, in the State of New Hampshire, and that the same was known to and combined by the said William Collins, as early as January, 1861, and prior to the time when it is alleged in said bill of complaint the same was invented and discovered by said Purches Miles, patentee as aforesaid.

And these defendants further answering say, that they do not know and are not informed, save by said bill of complaint, whether or not said Purches Miles sold and conveyed his right,

title, and interest in the said patent, so mentioned in the bill of complaint aforesaid, or any interest therein to the said Double-Pointed Tack Company, and they leave the complainant to make such proof thereof as he shall be advised is material.

And these defendants on information and belief deny that by virtue of any such letters patent and assignment as mentioned in said bill of complaint said complainant herein became or ever was possessed of or vested with any exclusive right to
23 make, use, or vend in the United States, or elsewhere, the alleged invention patented by the said letters patents.

And these defendants, further answering, allege that the said Purches Miles is not the original and first inventor or discoverer of the said invention and discovery aforesaid, or of any material or substantial part of the thing, or of the principle and combination patented in and by the letters patent mentioned in the said bill of complaint; but that the same thing, same principle, and combination, or substantially the same, was in public use in the United States, at the city of Milwaukee, State of Wisconsin, and that the same was so used in the said city of Milwaukee and State of Wisconsin, aforesaid, by John Esch, who resides in the city of Milwaukee, State of Wisconsin, as early as 1842, and has been in such use more than two years before the 11th day of November, A. D. 1873, the date of the alleged application of said Purches Miles, patentee aforesaid, for a patent therefor; also, that the same thing and the same principle and combination, or substantially the same, had been on sale in the United States, in the city of Milwaukee and State of Wisconsin, and had been sold in said last-mentioned city by Joseph Fisher, who resides in said city of Milwaukee, as early as 1848, and had been on sale,
24 as aforesaid, for more than two years before the 11th day of November, A. D. 1878, the date of the alleged application of Purches Miles, patentee, as aforesaid, for a patent therefor; also, that the same thing, same principle and combination, or substantially the same, had been in public use in the United States, in Portage City, in the State of Wisconsin, and that such use was known to Edward E. Owens, who resides in the city of Milwaukee, State of Wisconsin, as early as 1859, and that the same had been in such use for more than two years before the 11th day of November, A. D. 1873, the date of the alleged application of said Purches Miles, patentee, as aforesaid, for a patent therefor.

And these defendants, further answering, deny that said complainant, the Double-Pointed Tack Company, have any exclusive right to manufacture, sell, or use the alleged invention or combination, as set forth in the patent mentioned in the bill of complaint aforesaid; but, on the contrary thereof, these defendants allege upon information, and believe it to be true, that the com-

bination, as set forth in second claim of the patent, mentioned in the bill of complaint aforesaid, is a mere aggregation of known parts that do not combine to produce any new result, and is therefore void.

And these defendants deny that there is any other matter, cause, or thing in said complainant's bill of complaint contained, material or necessary for these defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true, to the knowledge or belief of these defendants. All of which matters and things these defendants are ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed, with their reasonable costs and charges, in this behalf most wrongfully sustained.

TWO RIVERS M'F'G CO.,
By HENRY MANN, *President.*
JOSEPH MANN,
HENRY MANN.

FINCHES, LYNDE & MILLER, *Solicitors for Defts.*
WM. P. LYNDE, *of Counsel.*

UNITED STATES OF AMERICA, }
Eastern District of Wisconsin, } *ss:*

Henry Mann, being duly sworn, deposes and says that he is one of the defendants in this cause; that he is president of the Two Rivers Manufacturing Company, and one of the firm of Mann Brothers; that he has heard read the above answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated upon information and belief, and those he believes to be true.

HENRY MANN.

Subscribed and sworn to before me this 6th day of January, A. D. 1879.

[SEAL.]

WILLIAM H. MORRIS,
Notary Public, Milwaukee Co., Wisconsin.

Order denying Injunction, and that Defendants file Indemnity Bond.

January 7, 1879. This day came the parties by their respective counsel; and, on consideration of the motion of the complainant for a preliminary injunction, it is ordered by the court that said motion be, and hereby is, denied. And it is further ordered that the defendants make and file bi-monthly reports during the pendency of this cause of the quantity of bail-ears, of the kind described in the bill of complaint, manufactured, sold,

or used by them, and that the first report may cover the time from November 4, 1878—the date of filing the bill—to February 1, 1879, and shall be filed on or before the 10th day of February, 1879, and that subsequent reports be made for each two months after February 1, 1879, and be filed on the 10th day of the following month. And it is further ordered that the defendants file an indemnity bond running to the complainant in the sum of one thousand dollars, conditioned to pay to the said complainant
27 whatever damages may be awarded it by the decree of the court for the infringement of the complainant's patent described in said bill, within ten days, with sureties to be approved by the clerk.

January 16, 1879. This day came the defendants and filed their indemnity bond in the sum of one thousand dollars with A. Weigell as surety, approved by the clerk.

February 17, 1879. This day came the complainant by its solicitors and filed its replication, as follows:

Replication.

Circuit Court of the United States for the Eastern District of Wisconsin.

THE DOUBLE-POINTED TACK COMPANY
vs.
THE TWO RIVERS MANUFACTURING COMPANY, JOSEPH MANN AND HENRY MANN. } In Equity.

The replication of the Double-Pointed Tack Company to the answer of the Two Rivers Manufacturing Company, Joseph Mann and Henry Mann, defendants to the bill of complaint of the above-named complainant.

The repliant, saving and reserving all and all manner of advantage of exception to the manifold insufficiencies of said answer, for replication thereunto says, that it will aver and prove its said bill to be true, certain and sufficient in the law to be
28 answered unto, and that the said answer of said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this that any other matter or thing whatsoever in said answer contained material or effectual in the matter to be replied unto, confessed or avoided, traversed or denied, is true, all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

MURPHEY, GOODWIN, AND MITCHELL,
Solicitors for Complainant.

N. S. MURPHEY, *of Counsel.*

February 25, 1879. Defendants' report from November 4, 1878, to date, filed.

March 18, 1879. Substitution of Murphey and Goodwin as complainant's solicitors, filed.

March 19, 1879. Stipulation of parties extending time to take testimony to July 15, 1879, filed.

April 26, 1879. Defendants' report from February 25, 1879, to date, filed.

September 11, 1879. "On motion of Murphey and Goodwin, complainant's solicitors, ordered that this cause be, and the same is hereby, set down for hearing at the next term of said
29 court to be held at the city of Milwaukee on the first Monday of October next."

September 24, 1879. Testimony in chief on behalf of complainant, filed.

October 6, 1879.—Depositions of John Esch and others on behalf of defendants received from Phil. Wiborg, notary public, and filed.

October 25, 1879.—Depositions of Lemuel W. Serrel and Purches Miles, on behalf of complainant, in rebuttal, filed. And same day, Deposition of Henry Mann on behalf of defendants, in rebuttal, received from Phil. Wiborg, notary public, and filed.

December 13, 1879.—"On motion of Murphey & Goodwin, complainant's solicitors, ordered, that this cause be set down for hearing at the next term of said court, commencing on the first Monday of January, 1880."

Hearing.

February 3, 1880.—This day came the parties, by their counsel, and this cause came on to be heard upon the pleadings and proofs, and was argued by Messrs. A. von Briesen and N. S. Murphey, for the complainant, and by Mr. Wm. P. Lynde for the defendant; and the hearing being concluded, the court took the same under advisement.

And on said hearing the following testimony was read in evidence, to wit:

30 *Comptainant's Testimony.*

Circuit Court of the United States for the Eastern District of Wisconsin.

THE DOUBLE-POINTED TACK COMPANY
vs.
HENRY MANN, JOSEPH MANN, AND THE TWO RIVERS MANUFACTURING COMPANY. } In Equity.

Testimony *de bene esse* taken pursuant to notice on behalf of

complainant, before T. B. Mosher, notary public, New York, April 9, 1879, 11 o'clock a. m.

Present, A. v. Brieson, Esq., counsel for complainant, and W. P. Lynde, Esq., counsel for defendants.

Counsel for complainant offers in evidence certified copies of letters patent No. 147,343, dated February 10, 1874, and granted to the Double-Pointed Tack Company, assignee of Purches Miles, for improvement in bail-ears, and the same is marked Complainant's Exhibit A, T. B. M., notary public.

Deposition of Purches Miles.

Purches Miles, being called on the part of complainant, and being duly sworn, deposes and says:

My name is Purches Miles. I am forty-seven years of age; reside in Brooklyn, New York. My occupation that of
31 manufacturing articles of small hardware. I am the same Purches Miles mentioned in letters patent, complainant's Exhibit A. I am secretary of the Double-Pointed Tack Company, the complainant. I produce a bail-ear made by the complainant under letters patent Exhibit A.

The same is offered in evidence by counsel for complainant, and is marked Complainant's Exhibit "B," T. B. M., notary public.

(Counsel for complainant being called into court, the further examination of the witness Miles is adjourned by consent of counsel to 3 o'clock p. m.)

Three o'clock p. m. Present counsel as before. Witness continued:

I also produce a bail-ear, such as are made by the complainant, but without the washer. They are usually sold with the washers, but not always.

(The bail-ear produced by the witness is offered in evidence and marked Exhibit C, T. B. M., notary public.)

Witness continues:

I find that the bail-ear in "Exhibit A, Joseph Stoffel," is made the same as those manufactured by complainant, and as Exhibits B and C. The diagonal cut on the lower side of the points is cut at such an angle so that in pentrating the wood they incline upwardly. Made in that way, it causes them to hold much
32 more firmly, and as the points pass through, they clinch more readily, and clinch upwardly. If they clinch upwardly, it is almost impossible to draw them out without splitting the stave.

The bail-ear shown in "Exhibit A, Joseph Stoffel," is the same as that shown in complainant's patent, Exhibit A.

Cross-examined:

I have never seen any bail-ears that were made by William Collins, of Marlborough, New Hampshire. I have seen models constructed after his bail-ears. I think I did not see the drawing and model which he filed in the Patent Office with his application for a patent, but have seen a pencil sketch. I was in Washington at the time the interference case was pending between Alfred Miller and myself and other partners in 1876. I think I saw the testimony presented by my counsel in that case.

X Q. 1. Was there not filed in that case a copy of the application made by Collins for a patent, and also a specimen of the bail-ear which he claimed as his invention?

(Objected to as not cross-examination, and as the record referred to will speak for itself, and is the best evidence.)

A. I do not recollect that there was a copy of the application used there; there may have been. I think not, however.

33 X Q. 2. Don't you now recollect seeing at that time a model of the Collins bail-ear?

(Same objection as before.)

A. I think I did.

X Q. 3. What is the distinctive difference between the Collins bail-ear and yours?

A. In his model, or one after his pattern, the eye was made nearly in a whole circle, then the points or prongs ran straight in from the body of the ear, and there was no diagonally cut points, especially in the way in which I made mine.

X Q. 4. Were not the points of his bail-ears cut diagonally?

(Objected to as already answered.)

A. I think they were. I won't say positively whether they were cut all from one side or not, from the rough drawing I saw. They were cut on the side instead of on the bottom, and the prongs ran in at right angles with the lower part of the body of the ear. They ran in straight because the cut was on the side; they may have diverged sideways, but not upwards.

X Q. 5. When did Mr. Collins make that invention?

(Objected to as not cross-examination and hearsay.)

A. I don't know.

X Q. 6. Did you have anything to do with taking the testimony of Mr. Buss and Mr. Tenney in that interference

34 case in regard to the Collins bail-ear?

(Same objection as above.)

A. I did.

X Q. 7. Did you know at the time what they testified to?

A. I did. I was present at the examination. I or my counsel used the testimony afterwards in that interference case, (Miles *et al. v.* Miller.)

X Q. 8. Your also had an interference with John C. Krichbaum, of Ohio, in regard to your patent, did you not?

A. No, sir.

X Q. 9. What was that interference about?

(Same objection.)

A. It was an interference with William Collins' late application for a patent.

X Q. 10. Was that application of Collins' upon the same bail-ear to which you have referred in your testimony?

(Same objection.)

A. Yes, sir.

X Q. 11. How came you to be made a party to that interference; what interest had you in it?

(Same objection.)

A. My counsel thought that Collins might obtain a patent.

X Q. 12. Did you appear for the purpose of preventing a patent being issued to Collins?

(Same objection.)

35 A. No, sir. If Collins was successful I would have been interested in his patent. I was interested in his application.

X. Q. 13. In what respect does the bail-ear used by you differ from all bail-ears in prior use?

A. Quite materially. In the first place, the eye or loop is made differently; the prongs are cut in a different manner, and are bent so as to stand upwardly, so that as the ear is driven into the wood they penetrate upwardly. The Collins bail-ear did not have what I call a loop, although it may be so considered in some cases.

X Q. 13½. Is not the only difference between the Collins loop and your loop, that his was a complete circle and yours but a segment of a circle?

(Same objection.)

A. That is not the only difference. It is between the loops, but not the whole ear together.

X Q. 14. Were the points of Collins' bail-ear and the Krichbaum bail-ear at right angles to the body of the ear, and were they not also inclined?

A. They were at right angles, but not inclined.

X Q. 15. Did not your claim in the Miller interference case, that bail-ears made of iron in the form of Collins' and Miller's, were public property, and had been for a long time in common use?

(Objected to as immaterial.)

A. Yes, sir; made exactly as those were.

36 X Q. 16. Will you look at the pail marked Stoffel, Ex-

hibit A, and state whether the point which is there visible shows any curve from having been driven into the wood?

A. There is a curve which is caused by having been driven into the wood, so much so that the cut on the lower point has bent the ear a little.

X Q. 17. Do you claim, Mr. Miles, that you were the inventor of cutting points diagonally, so that, in driving them into substances of wood or other material, it would cause them to incline in an opposite direction from the cut side?

(Objected to as incompetent, as the claims of the patent are in controversy and not any further claims which the witness may have, and as the patent speaks for itself.)

A. To the best of my knowledge I am, so that the points incline upwardly, and both in the same direction.

X Q. 18. Isn't it a fact well known to all mechanics, and has it not been for years, that, by cutting points diagonally, that, when they were driven into a hard material such as wood, the points would bend or incline towards the side which is not cut?

(Same objection.)

A. I know that they will; but I don't know whether other mechanics know it or not.

37 X. Q. 19. What advantage is there in having the points of those bail-ears incline upwards rather than sideways, or one up and one down?

A. For this particular use, if the points go in sideways, it is apt to split the stave and make a bad finish on the inside of the pail. If the points are driven apart, one up and the other down, the result would be that the lower point would not hold in so well as the points do in the ear which I manufacture. That is my opinion.

Re-direct.

R. D. Q. 20. Did you, before you made this invention, ever see a bail-ear which when driven would make both points incline parallel to each other?

A. No, sir; I never did.

R. D. Q. 21. Is it practicable to manufacture a bail-ear so that the points will diverge when driven, as stated in the last cross-question?

A. It would not be practicable to manufacture; machinery could not be well arranged so as to make them practicably, as far as I know.

PURCHES MILES.

Sworn and subscribed to before me, this 9th day of April, 1879.

[SEAL] T. B. MOSHER,
Notary Public, 134, *N. Y. County.*

Counsel for defendant waives further cross-examination
38 of witness Stoffel.
Complainant rests its *prima facie* case.

UNITED STATES OF AMERICA, }
Southern District of New York. } *ss:*

I, T. B. Mosher, a notary public, duly commissioned and sworn under the laws of the State of New York, do hereby certify that the foregoing deposition of Purches Miles was taken, subscribed, and sworn to before me this 9th day of April, 1879, pursuant to notice given on the 27th day of March, 1879, *de bene esse*, and that counsel were present for the respective parties. I also certify that the reason for taking the foregoing deposition is that said witness lives more than one hundred miles distant from Milwaukee, Wisconsin, the place of trial.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said suit named, nor in any way interested in the event of said cause.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 9th day of April, 1879.

[SEAL] T. B. MOSHER,
Notary Public (134) *N. Y. County.*

39 *Complainant's Exhibit A. T. B. M., Notary Public.*

DEPARTMENT OF THE INTERIOR,
United States Patent Office.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed it a true copy from the records of this office of the letters patent granted Double-Pointed Tack Company, dated February 10, 1874, No. 147,343, for improvement in bail-ears.

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed this twenty-eighth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the one hundred and third.

[SEAL.] W. A. DOOLITTLE,
Acting Commissioner.

No. 147,343.

THE UNITED STATES OF AMERICA:

[Engraving of Patent Office.]

To all to whom these presents shall come:

Whereas Purches Miles, of New York, New York, has presented to the Commissioner of Patents a petition praying for the grant of

letters patent for an alleged new and useful improvement
40 in bail-ears, (he having assigned his right, title, and interest in said improvement to Double-Pointed Tack Company, of same place,) a description of which invention is contained in the specification, of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided; and whereas, upon due examination made, the said claimant is adjudged to be justly entitled to a patent under the law:

Now, therefore, these letters patent are to grant unto the said Double-Pointed Tack Company, its successors or assigns, for the term of seventeen years from the tenth day of February, one thousand eight hundred and seventy-four, the exclusive right to make, use, and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the city of Washington, this tenth day of February, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-eighth.

[SEAL.] B. R. COWEN,
Acting Secretary of the Interior.

Countersigned:

[SEAL.] M. D. LEGGETT,
Commissioner of Patents.

41 UNITED STATES PATENT OFFICE.

Purches Miles, of New York, N. Y., assignor to Double-Pointed Tack Company, of same place.

IMPROVEMENT IN BAIL-EARS.

Specification forming part of Letters Patent No. 147,343, dated February 10, 1874; application filed November 11, 1873.

To all whom it may concern:

Be it known that I, Purches Miles, of the city and State of New York, have invented an Improvement in Bail-Fastenings for Pails, Tubs, &c., of which the following is a specification:

Wire staples have been employed to form the fastening eyes for bails, and these have been driven into the wood with the penetrating points nearly at right angles to the surface, and in use they are liable to pull out by the weight.

My invention consists in a bail-fastening staple made of wire with the penetrating ends cut at such an angle that in driving them into the wood they will assume an upward inclination, so that the weight will tend to force such points inwardly rather than to draw them out, and the bending of the ends in clinching

will always be upwardly, thus making a much better and more reliable article than heretofore; and I combine with such fastener a convex metallic washer to keep the bail from contact with the wood or the paint thereon.

In the drawing, Figure 1 is a section of the fastening complete. Fig. 2 shows the compound staple fastening separately; and Fig. 3 is an elevation of the washer.

The wood-work *a* represents part of a pail or tub, and the bail *b* is of wire, having eyes *c* at the ends, which are bent so as to stand parallel or nearly so to each other. The compound staple-fastening *d* is made with the penetrating points 2 3, loop 4 for the eye *c*, and the body 5. The ends 2 3 of the wire are cut diagonally, so that in driving them into the wood the tendency is to bend upwardly and clinch, and they will usually be long enough to pass through the wood and be clinched. The body 5 of the fastenings stands vertically or nearly so, and will usually be partially embedded in the wood. The sheet-metal washer *e* prevents the eye *c* coming against the wood. The points of the staple penetrate the wood upwardly so as effectually to prevent the staple pulling out under the ordinary strain to which it is subjected.

I claim as my invention—

1. The compound staple-fastening *d* for bails made with the diagonally-cut penetrating points 2 and 3, loop 4, and body 5, said diagonally-cut points being positioned as set forth, so as to bend upwardly in driving into the wood, as set forth.

2. The convex metallic washer *e*, in combination with the compound bail-fastening staple *d*, having upwardly-penetrating points 2 3 and loop 4, as and for the purposes specified.

Signed by me this 1st day of November, A. D. 1873.

PURCHES MILES.

Witnesses:

GEO. T. PINCKNEY,
CHAS. H. SMITH.

(Here follows diagram, marked page 42.)

43 *Defendants' Testimony.*

United States Circuit Court, Eastern District of Wisconsin.

DOUBLE-POINTED TACK COMPANY, Complainant,
vs.
TWO RIVERS MANUFACTURING COMPANY, JOSEPH MANN and HENRY MANN, Defendants.
} In Equity.

Testimony of witnesses and other evidence, taken on the part of the defendants herein, at the law office of Finches, Lynde & Miller, No. 102 Wisconsin street, Milwaukee, Wis., July 3, 1879,

No. 323
Double Pointed
Tack Co.
v.
Two Rivers Manufg
Co. et al

page 42

P. MILES.
Ball-Ears.

No. 147,343. Patented Feb. 10, 1874.

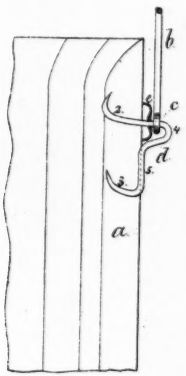


Fig. 1.

Fig. 2

Fig. 3

Witnesses,
Charles Smith
Harold Small

Inventor
Burches Miles
per L. W. Serrell
Atty

(10)

before Phil. Wiborg, a notary public in and for the State of Wisconsin, pursuant to agreement of counsel hereto.

Complainant appeared by N. S. Murphey; defendants by Wm. P. Lynde.

Deposition of John Esch.

John Esch, being duly sworn, testified as follows:

I am 55 years old; my occupation is wagon-making, and I reside at No. 112 Doty street, Milwaukee; I have lived here since 1842. I carry on blacksmithing in connection with wagon-making. I have seen staples such as are in Exhibit A ever since I have been in the wagon business; I cut Exhibit A, which is a part of a fell of a wagon, off an old wagon which was fifteen or twenty years old at least. The staple is used to hold the
44 saddle strap and prevent its slipping back, and to hold the wagon in going down hill. This same form of staple is also used for the back breeching strap, used to fasten the back breeching strap. When the staple is used to hold the back breeching strap it is put through the staple. This form of staple has been in common use for lumber one-horse wagons ever since I have been wagon making down to the present time. A staple similar in form is used frequently to hold the hammer strap in two-horse wagons. This old staple used upon the wagon fill is similar in shape to complainants' Exhibit C.

Q. You see that on complainants' staple the points are beveled on the lower side; what is the effect of that bevel in driving the staple into wood?

A. From my experience, where a point is made by cutting or beveling one side, in driving it into wood the point is forced out or against the bevel.

Q. How long has it been known that by beveling the point it would have a tendency to push the point out?

A. Well, sir, I do not know. I know from my own experience. I have known it for ten or fifteen years from my own observation. That is where I got the theory from—from experience. I am not familiar with horseshoeing.

Q. Have you ever observed the form of horse nails?

A. Not much; no, sir.

45 Q. Are not chisels all beveled on one side?

A. Yes, sir; most of them. Some for turning purposes are beveled on both sides; but mostly all working chisels are beveled one way.

Q. What is the effect in driving a chisel into wood, of the bevel in the chisel, where it is held perpendicular?

A. I judge if you drive a chisel, holding it up straight, it draws the bevel from the chisel.

Q. Throws the chisel out?

A. Yes, sir.

Q. What will be the cut?

A. Of course the cut has got to follow the chisel, or the chisel drives the cut.

Q. Will you look upon defendants' "exhibit board" and state whether if cuts 1, 2 and 3 were made by driving a chisel perpendicular to the board; if so, why was not the cut perpendicular instead of being slanting?

A. Because the chisel was slanting—round on one side—driving, as I showed you first, like a wedge sharpened on one side.

Q. And the bevel of the chisel forced it out?

A. Yes, sir.

Q. How long has that result been known?

A. I presume, for ages; as long as the chisel has been in use. As soon as a mechanic gets hold of a chisel he has got to learn that pretty quick.

Q. Do you know of a staple similar to the complainant's being used for other purposes than in and about wagons?

46 A. I have. I got an idea I made similar staples, the same form, for hames.

Q. Is that all that occurs to you now?

A. Yes, sir.

Q. What kind of hames do you refer to—wooden hames?

A. Yes, sir; such as they use for heavy draught-horses.

Q. How are they used in the hame, and for what purpose?

A. They hold the straps—the hame-straps.

Complainant's counsel objected to each and all the questions propounded to the witness on the direct examination, as being immaterial and irrelevant testimony.

Cross-examination:

Witness is shown what purports to be a circular-card, signed The Double-Pointed Tack Company, 128 Chambers street, New York, and marked "Exhibit circular," containing what purports to be the drawing of a pail bail-ear and washer; and witness is asked if he understands the drawings as they appear on the face of that circular.

A. I understand these drawings. Yes, sir.

Q. Will you examine the staple that is represented on the drawing of that circular, and state what, if any, difference there is in the shape and construction of it as compared with staple in defendants' Exhibit A.

A. Well, sir, this staple is a little differently bent there.

Q. Which staple? You mean the staple on the circu-

47 lar exhibit?

A. The bend of it is differently shaped.

Q. The form of it is a little different from the defendants' exhibit?

A. Yes, sir.

Q. State in that connection what the difference is.

A. All the difference there is in it is, this strikes the wood there and holds close down; this staple is bent a little different in there, and this strikes the wood flat there.

Q. The staple, you mean, on the circular exhibit?

A. Yes, sir.

Q. And you mean it strikes the wood flat as between the two prongs?

A. Yes, sir.

Q. Whereas in the defendants' exhibit it is more circular?

A. Their's is more circular, right in there.

Q. Between the two prongs?

A. Yes, sir.

Q. State whether there is not another difference—namely, is it not true that the prongs on the staples on exhibit circular are cut diagonally on the points on the under side of each, which does not appear on the defendants' Exhibit A; is that not true?

A. I see they are sharpened one way. That in there is in the wood; you can't tell how that is.

Q. They are sharpened one way, you say?

48 A. Yes, sir.

Q. Now look at the one that is in the wood, that protrudes through the wood, and state if you cannot see that it is not so sharpened?

A. I should judge not. It seems to be sharpened right up straight.

Q. Is it not true that there is this further difference in the two staples: is not the lower bend in the staple on the circular exhibit bent at an acute angle; and is not the upper bend in the staple at an obtuse angle?

A. Yes, sir; that is what it shows on the paper here.

Q. State whether, in the defendants' exhibit, so far as you can observe from it, whether those angles are not different at both ends. Is it not true that, on the longer angle of the defendants' staple, that it is at right angles—bent at right angles, as near as may be?

A. That is on this; yes, sir.

Q. You have stated on your direct examination that the effect of driving a staple of the kind drawn on the circular into a piece of wood would be to incline the points upward.

A. Yes, sir; I stated that the point would draw where the bevel was.

Q. Go out—would draw out?

A. The same as I showed on that board; yes, sir.

A. Threshing machine; I don't remember seeing this before until after it was taken out; I may have seen it in the wood.

Q. Are staples like defendants' Exhibit C, in very common use, and have they been for how long?

A. They have been as long as I have been acquainted with the trade, in very common use.

Q. For what purposes have they been used?

A. They have been used for threshing machines, and also wagons; they are very common on threshing machines;
52 they have been using them on what we call the decking to fasten down the decking on the top of the machine; there is a hook which comes down from the decking and hooks into the upper angle of the staple; we use six on each side of the machine; we have been using them a long time.

Q. How long have you known them to be used in that way?

A. Well, they have been used as far back as eighteen years anyhow.

Q. On threshing machines?

A. Yes, sir; I don't know but longer; I remember putting them on when I was an apprentice; there is one thing with those staples—they were of a smaller iron, of $\frac{1}{8}$ wire or wrought iron; what we use for decking is smaller than this; what we use on wagons is still a little larger than defendants' Exhibit A.

Q. What difference is there in form between Exhibit C and the drawing of complainant's patent Exhibit A?

A. I cannot see much difference, only this: If I understand right, we make our points more regular, tapering, and this is slanting, what I call beveled.

Q. Do you mean the bevel at the point, or the inclination of the points just from here out?

A. Yes, sir, simply that; the heavier ones for wagon tongues we hammer out; the points here we hammer right out sharp, something like Exhibit C; and those for threshing machines we take a large lever shears and cut this beveling out on it in place of hammering it; it is so much quicker; we do it the same
54 time we cut the iron for the ring.

Q. The points of these staples you use in threshing machines are cut diagonally, are they?

A. Yes, sir; they are cut tapering with shears; for instance, we take the iron and cut it slanting, so, and turn this for the staple and use this end, and that forms a point on each end of the staple, and we take and bend them afterwards.

Q. How long have you known the points of those staples used in threshing machines to be cut in that way?

A. Well, that is as long as I can remember—the smaller ones; the bigger ones we hammer out.

Q. Are those points, both of them, cut on the same side; how do you cut them—on the upper side, or lower side, or sideways?

A. We cut the wire diagonally, so as to form a sharp point; we are not particular as to which side of the point is beveled, the object being to get a sharp point; sometimes the bevel is on the lower side and sometimes on the upper, and sometimes on different sides of the two points.

Q. What is the effect of the beveling upon the direction which the point takes in driving the staple into the wood?

A. We make a hole through the board, and form the points and put them through and rivet them on the other side.

Q. I mean the beveling on the points which you make; what is the effect of that beveling in the direction which the
55 points will take in the driving of it into the wood?

(This question is objected to by complainant, because the witness has stated he did not drive the staples he made into the wood, but that a hole was first prepared for it, and the consequence, what effect the driving into the wood, witness does not presume to know.)

A. It follows the direction of the hole the way it is pointed, for we make the hole a little smaller.

Q. But where you do not make any hole, what will be the effect—how will it enter the wood?

A. The effect of it would be, if we drove them into the wood, it would spread into the wood as we drove them.

Q. Suppose they were both cut on the lower side, what is the effect?

A. The effect of it would be they would run out.

Q. It would push the points in an opposite direction from the bevel?

A. I don't think you can drive them straight into the wood; I have never tried it.

Q. Don't you know, as a mechanic, that the effect of the bevel is to force the points out in an opposite direction from the bevel?

A. Yes, sir; it is inclined to do that. It will do it, there is no doubt, providing that the hole is not large enough.

Q. It is the same principle shown in driving a chisel into wood?

A. Yes, sir; or in iron. It would slant off on the
56 bevel every time.

(Counsel for the complainant objected to the foregoing testimony as delivered, upon the ground that the same was irrelevant and immaterial.)

Cross-examination:

Q. What did you say your business was, Mr. Owens?

A. I am a machinist by trade.

Q. What kind of a machinist?

A. Building threshing-machines—machines of all kinds.

Q. Will you examine the drawings of the staples upon complainant's patent, Exhibit A, and state if you understand those drawings?

A. Yes, sir; I do.

Q. And also examine defendants' staple, shown in Exhibit A, and state briefly what difference, if any, there is in the construction of the two staples.

A. Well, I don't see much difference in them, except this: complainant's Exhibit A, as I understand the drawings, is made out of round iron, and the defendants' Exhibit A is made out of half-round iron.

Q. Is there any other difference, that occurs to you now?

A. I don't see much difference, only that is a little higher.

Q. The lower angle in complainant's staple is a little straighter, if anything, between the loop and where the points bend out?

A. Yes, sir.

Q. Anything else?

57 A. Well, the points on defendants' Exhibit A seem to be almost straight, only hammered a little on the one side, forming some sort of a wedge point.

Q. The points of the staple do not appear to be sharpened.

A. No, sir; only on one side.

Q. State whether it does not also appear, from defendant's Exhibit A, that the staple is put through the wood after the hole being first bored.

A. I think that is after the hole was bored, from the looks of it.

Q. Now I call your attention to some other points of difference. Is it, or not, true that there is a difference between the two staples in this, that in complainant's drawing the angle on the upper part is an obtuse angle, and the lower bend is an acute angle, which does not appear in the defendants' Exhibit A?

A. This has a slant, and that seems to be tapering from both sides.

Q. Is there not this difference: That the upper angle on complainant's drawing—is that not an obtuse angle, while at the lower angle it is more acute—that does not appear on defendants' Exhibit?

A. I don't see much difference with the exception of here to the points.

Q. Were it begins to the bevel?

A. Yes, sir.

Q. Is it not true that the angle on complainant's drawing
58 at the upper end is more obtuse than it is at the lower end?

A. This seems to throw out more here than what that is. I don't think, when you come to strike a line from here to there, there is much difference; that point makes it appear so much.

A. Is not the angle on defendants' Exhibit A, at the longer point, a right angle, or as near as may be a right angle?

A. It ain't quite a right angle.

Q. Is it not nearly so?

A. Pretty nearly; yes, sir.

Q. Is there not this further difference between the two: Is there not a bevel on the under side of both points of complainant's staple, as shown on his drawings, that, so far as you can see, does not appear at all, and is not visible on defendants' staple, Exhibit A?

A. Yes, sir.

Q. Do you know the use of complainant's staple, as shown in these drawings—do you know the use to which it is applied?

A. I have heard; yes, sir.

Q. Suppose that that staple were driven into the side of a common pail, the long prong, a more obtuse angle, being placed above and the short below, and driven into the side of a pail, with the bevel cut as it appears to be on each of the points, what course would the respective points naturally take in being driven into the wood?

59 A. Naturally work up.

Q. Suppose that the bail to the pail were first secured inside of the upper angle, state whether the effect would not be to make the staples respectively adhere to the wood and remain under a stronger pressure than if they were driven in perpendicular.

A. They would; that is, they would stand more pressure, of course; they would not pull out as quick.

Q. The pressure from the carrying of substances in the pail suspended by the bail would come upon this upper angle, would it not?

A. Yes, sir.

Q. And the inclination of the points being upward in the wood, would be less likely to come out by that pressure than if it come in perpendicular?

A. Yes, sir.

Q. I understand you, Mr. Owens, to say with respect to this system of clipping the points of the staples that you put into wood that the primary purpose of that clipping was to get a point, but that you did not take into account the direction that the points were to take at all, but just merely to get a point that

would follow the hole, and you clipped them merely because it was cheaper than to hammer them out?

A. Yes, sir.

Q. The hole you first prepared, and the point was expected to follow that hole?

A. Yes, sir.

60 Q. You were indifferent, I understand you, as to which side of the point you created the bevel?

A. Yes, sir; I wanted to form a point, and that is all.

Q. After they passed through the wood your habit was to clinch them on the other side by bending them?

A. Yes, sir.

Q. Well, Mr. Owens, will you state whether before you saw or were informed of this bail-ear in the pails in question you ever knew of a double-pointed staple being used either in the making of pails or in the wagon-tongue as you have described, or for other purpose, with the bevel on the same side of the two points for the purpose of giving it a certain and uniform direction in being driven into the wood, before you knew of these pails?

A. No, sir; I never knew they were used for pails; I know they were drove into the tongue of wagons.

Q. You don't understand my question. Did you ever know of a double-pointed tack or staple being so driven into wood for any purpose of any mechanical construction where the bevel was on the same side of the two points, and for the purpose of giving them a certain direction in the wood?

A. Well, no; but we have beveled them in different ways; where we cannot clinch them we cut them on one side. I never paid any attention to slant them on the same under side, but we often take and hammer and even file them on one side so

61 they will run slanting, so they will hold firm, when we could not clinch them, but we never paid any attention in regard to which side they were to run, up or down. A pull on a common staple, when you pull so, would make it come right out.

Q. Then you never knew, if I understand you, of a double-pointed tack or staple to be cut with the bevel on the same side of both points, observing the uniformity of position in cutting, before?

A. Not where the strain comes the same as on a pail; I knew they were cut so; I never paid any attention to it particularly. I do not know of any use where the strain comes the same as on a pail.

Q. Those staples you have generally made for the purpose of putting the same in wood, were staples on which the strain came generally no more on one side than on another—is that not true?

A. Yes, sir.

Re-direct examination:

Q. You have stated where this complainant's staples with the diagonal cut on the lower side, are driven into wood, that the points would naturally work up; is that a principle that has been well known to mechanics for years, or is it something new?

A. Well, that has been known for years; whether it is down or up, it will slant off from the bevel, that has always been known.

62 Q. It is a common principle?

A. Common principle so far as that is concerned; yes, sir.

Re-cross-examination:

Q. Did you ever see that principle applied to bail-ears on pails?

A. No, sir; not that I know of.

Re-direct examination:

Q. You never made any pails yourself?

A. Never saw any made.

E. E. OWENS.

Offer of Documentary Evidence on behalf of Defendants.

Defendant offers in evidence certified copy of patent No. 77,853, dated May 12, 1868, to Jonathan Walton, of Brooklyn, for improvement in bail-ears; which is objected to by complainant on the ground that it is irrelevant and immaterial; but the objection is not made because the same is not certified from the Patent Office, but it is stipulated that the same may be used with the same effect as if the same were certified by the Patent Office according to law; which is marked "Exhibit Walton," P. W.

Also re-issue No. 7222, dated July 11th, 1876, to Jonathan Walton, of patent No. 77,853, as appears in volume of which is objected to for the same reasons as last above, and

63 because the said re-issue includes a prior claim than was embraced in the original pretended invention.

Defendant further offers in evidence copy of patent from Patent Office, issued to J. C. Krichbaum, for water-pail ear, dated May 4, 1869, No. 89,666, which is objected to by the complainant on the ground that it is immaterial and irrelevant, but it is agreed that the same may be used on the trial with the same effect, and no more, than if were duly certified from the Patent Office as required by law: which is marked "Exhibit Krichbaum," P. W.

Defendants' counsel also offers in evidence copy of patent for bail and ear for buckets, issued April 14th, 1874, to Chas. H. Butters & Co., assignees of Alfred Miller, No. 149,594, as appears in the April volume of on the page; which is objected to by the complainant on the ground that the same is irrelevant and immaterial.

Defendants' counsel also offers in evidence a certified copy of the caveat of A. Miller, filed August 23d, 1873, for bail-ear for well-buckets; which is objected to by counsel for complainant upon the ground that the same is incompetent and immaterial; marked "Exhibit Caveat," P. W.

64 Defendants' counsel also offers in evidence a certified copy of the depositions in the matter of the interference of Miller against Miles for bail-ears for pails; which is objected to by the complainant on the ground that the same is incompetent, irrelevant, and immaterial; and because, 1st, it does not appear that the same was taken in any case or proceedings to which the complainant was a party; and, 2d, it appears from the same that they are copies of depositions taken and used in the Patent Office on an interference declared to exist therein in respect to certain inventions or pretended inventions in dispute between one Alfred Miller and Purches Miles, to which contest or controversy the complainant was not a party, and had no notice of the examination or cross-examination of any witnesses, and had no opportunity to do so; marked "Exhibit Miller agst. Miles," P. W.

Defendants' counsel also offers in evidence certified copy of files in the Patent Office, of the file wrapper, contents and drawings, in the matter of the application of Wm. Collins, filed February 29th, 1868, for pail and tub ears. To the admission of the record last offered complainant objects for the same reasons as stated in the objection last stated, and because the said pretended record last offered is not evidence nor made such by any law; marked, "Exhibit Application of Collins," P. W.

65 Defendants' counsel further offers in evidence a certified copy of the decision of the examiner of interferences in the matter of the interference of Miller against Miller, for bail-ears for buckets. Objected to by complainant's counsel as incompetent, irrelevant, and immaterial, and for the reasons last before more particularly stated, marked "Exhibit Decision of Examiner of Interferences." P. W.

Defendants' counsel further offers in evidence a certified copy of the decision of the examiner-in-chief in the matter of the interference of Miller against Miles, which is objected to by com-

plainant's counsel as incompetent, irrelevant, and immaterial, and for the additional reasons specifically stated on the objections hereinbefore referred to, marked "Exhibit Decision of Examiner in Chief."

Defendants' counsel further offers in evidence the decision of the Commissioner of Patents in the matter of the interference of Miller against Miles, for improvement in bail-ears, as appears in the Official Gazette, volume 11, page 197, to which complainant's counsel enters same objections as last above set forth.

Defendants' counsel also offers in evidence re-issue to C. H. Butters & Co., assignee of A. Miller, of patent No. 149,594,
66 dated April 14th, 1874, as appears in the January volume of , on page . Complainant's counsel objects to the same for the reasons last hereinbefore set forth.

Deposition of William Willer.

William Willer, being duly sworn, testified as follows:

My age is forty-eight; I am a sash and door manufacturer; live on 4th street, in Milwaukee.

Q. How long have you lived in Milwaukee?

A. Twenty-five years.

Q. Have you been engaged in the same business during the whole time?

A. I was a contractor before; a builder.

Q. How long have you been in your present business?

A. I started for myself in 1855; ever since 1855.

Q. Mr. Willer, will you look at that staple, complainant's Exhibit C, and state whether you have seen used a staple of that form; and if so, for what purpose?

A. I have used some of these staples we make up ourselves for ventilation blinds, and sometimes I have bought staples in the store that were cut off like this; they use them in the gas works for ventilation on the roof, and some for breweries, barns, &c.

Q. Were the points cut diagonally, like this?

A. Yes, sir; they were cut in that way; by what machine I don't know; some were made flat this way for blind sta-
67 ples about 18 or 20 years ago; we had some staples that were not corrugated; they were smooth; they were cut off and had sharp points, so we could drive them, as they would go straight.

Q. Were those staples made of wire?

A. Wire; yes, sir.

Q. Were they cut on one side?

A. Some were cut on one side, and some were made so the point was right in the middle—on both sides. Some of them

were to be driven in the long way, and some the other way; that was just for the purpose as they needed.

Q. Some were cut off at one side, and some were cut on both sides, according as they wanted to use them?

A. Yes, sir. I understand that the patent on the Boardman blind staple run out this spring, or it will some time this year, but he dropped his price over half.

Witness is shown a couple of blind-staples, and asked whether Boardman's staples were like those.

A. Yes, sir; Boardman's staples are like these.

Defendants' counsel offers the staples in evidence, and they are marked "Defendants' Exhibit Boardman." P. W.

Q. What did you say about these staples being cut on this side?

A. One point is cut on one side, and the other on the other.

Q. And this double-pointed tack is cut one point on one side and the other on the other?

A. Yes, sir.

Q. For what purpose?

68 A. To hold better in the wood, so they won't come out easy, and drive straight; some of them come out sideways; the sharp point will be bent over, and will come through; the slat is very thin, about a quarter of an inch thick, but the old ones we used first were not corrugated like this, they were smooth wire, and were cut pointed on both sides.

Q. Was each side pointed on both sides?

A. Some were, and some only on one side; the old ones, made 18 or 20 years ago, if you would pull one out they would show what they are.

Q. Now, Mr. Willer, what is the effect in driving a tack in that is cut as this is—cut diagonally across? What effect will it have in the course which the tack will take in driving it into wood?

A. The effect of the bevel on the two points of the staple, when driven into wood, is to force the points in an opposide direction from the bevel, and to make it stronger.

Q. How long have you known that fact that that was the effect of beveling the point on one side?

A. So long as I have been in business. I might say, since I was a boy. I use some wedges on or against a post, or in the the ground, sharpened wedges opposite one side only, so it gives the pressure on the opposite side; the same purpose it does in the wood it does in the ground.

Q. It is a principle well known to all mechanics, is not it?

A. Yes, sir, so far as I know.

69 Q. You use a great many of these blind tacks, don't you?

A. Yes, sir; lots of them.
Q. Do you buy them by the gross?
A. I buy them by one or two hundred pound packages.
Q. Are the points of these tacks that you use so much—are they always or mostly cut diagonally like this?
A. Yes, sir.
Q. On one side?
A. On one side—yes, sir.

(Counsel for complainant objected, and objects to the introduction in evidence of the defendants' "Exhibit Boardman," as immaterial.)

Cross-examination:

Q. What was it you stated about having used a staple a good many years ago like this—what did you use them for?
A. For ventilation blinds.
Q. You observe, Mr. Willer, that there is a bevel on the under side of each of those points; do you know the uses for which these are now applied?
A. No. (Use explained to witness.)
Q. The bevel on these staples is on the under side of these points; what would be the effect upon the direction of those points by driving that staple in close up to the board? What course would these points take—what direction?

70 A. They would draw up and make it closer, and this prong being longer and the other one shorter; well, of course, as soon as that is driven, it brings the short one in closer and makes a tight pressure.

Q. It has a tendency to make it stronger by reason of its going out?
A. Yes, sir; it brings it up.
Q. And if you pull on the bail, in this way, the staple would be less likely to come out, because the points are inclined upwards?
A. Yes, sir.
Q. State, Mr. Willer, whether you ever before saw a double-pointed tack or staple with the bevel cut on the same side of both points, as this is.
A. Well, what they have for wire fences—what they call wire-fence staples—are cut just diagonally, too.
Q. Are they both cut diagonally on the same side, as these are?
A. I cannot remember particularly; they was like that.
Q. You cannot remember, then, whether those staples used in the wire fences were both beveled on the same side or on different sides?
A. I didn't take any notice of it.

Q. Can you now say that you ever saw before a double-pointed tack like this, with the bevel on the same side of each point, as this is?

A. I cannot recollect exactly.

Q. So, when you speak about having used this kind of a staple a great many years ago, you mean generally a staple of this shape, do you not?

71 A. I mean a regular blind-staple.

Q. And those staples were not all beveled on the same side?

A. I cannot remember; that is a matter I didn't think of. If they drive well, I didn't care how they were cut.

Q. In respect to the staple that is used in the blind, the pressure upon that staple is even at all points; there is as much strain one way as there is the other way?

A. Yes, sir.

Q. Now, on this staple, for the purposes I have explained to you it was to be used, the greater pressure would be on this upper angle, would not it?

A. Yes, sir.

Q. And the direction which these points are made to take in consequence of the angle there, you think must be more likely to hold than if they went in perpendicular?

A. Yes, sir. WM. WILLER.

Deposition of Joseph Money.

Joseph Money, being duly sworn, testified as follows:

I am about 38 years of age; my business, wire-worker; have lived in Milwaukee six years last June.

Q. How long have you been in the business of wire-working?

A. I cannot tell you; almost all my life-time; you might say since I knew what wire was; but in this country I have had about eleven years of it.

72 Q. Where did you work before you came to Milwaukee?

A. I worked in Chicago, for the National Wire Works.

Q. Mr. Money, won't you look at this staple, complainant's Exhibit C, and state whether you have ever seen a staple similar to that used; and if so, for what purpose and where?

A. Well, I never did, of that kind; not that shape. I never used one of those in my life of that shape. That is the shape I have always used (picking up a staple from the table), and which one so picked up is offered in evidence by defendants' counsel and marked "Exhibit Money," P. W.

The witness then takes a piece of wire and makes a staple in presence of the Commissioner, which he says is such as he has

made all his life, which is also offered in evidence by defendants' counsel and marked "Exhibit More Money," P. W.

Q. Are you accustomed to cut the points of your staples diagonally, as these are cut?

A. I always cut my staples on one side, so as to leave a beveled edge to the point.

Q. What effect does that bevel have upon the direction that the point will take when it is driven into wood?

A. If this here is cut on the other side you would see the difference; but where the points are cut one on the upper side and the other on the lower side the effect will be in driving the staples to force the points in towards each other.

73 Q. Then I understand you that the effect of the bevel is to force the points in an opposite direction from the bevel?

A. Of course; yes, sir.

Q. Is that a principle well known to mechanics?

A. I should think so. I think most anybody that uses them knows it.

Q. They could not help but know it?

A. I should think so.

Q. How long have you known that fact? How long have you known, by cutting the points as you have done here—beveling the points—the bevel would force the point in an opposite direction, or in an opposite direction from the bevel?

A. I have known that these last 9 or 10 years, or most as long as I have been putting up wire-works. I use them for wire-guards and basement windows.

Cross-examination:

Q. State whether the strain in the staple that you use in your business is any more in one direction than another; I mean whether the tendency for the staple to pull out comes in consequence of a pressure upon the staple in any one particular direction any more than another?

A. Well, that don't make any difference in a wire screen; there is not much pressure, anyway; but I put in my sta-

74 ples so the points will come together, in order that a burglar cannot get it out so quick; if it is pulled out it has got to come out this way by main force.

Q. Then, the strain or pressure on the staple you use is lateral—out, not up?

A. Not perpendicular; no.

JOSEPH MONEY.

Deposition of Joseph Fisher.

Joseph Fisher, being duly sworn, testified as follows:

Mr. Fisher, what is your age, occupation, and residence?

A. I will be forty-six next birthday; my business is saddlery hardware, and I live in Milwaukee.

Q. How long have you lived here?

A. I have been living here 32 years.

Q. Will you look at the staple marked complainant's Exhibit C, and state whether you have ever seen a staple similar in form to that used for any purpose; if so, where and when?

A. Yes, sir. I have seen a staple of a form similar to this on a large scale. In one instance I have seen it used on thills like defendant's Exhibit A. I have seen it used, I think, when I first came to this country, 32 years ago; I think the first year I was here. I have seen them used for over ten years back. I think they are now out of date. I have seen them used, and they are now used on hames, wooden hames. I think we have one in our
75 store now; they are little used now. (Hame shown witness.) This is the same kind I saw used 25 years ago. I cannot tell exactly, but I don't think it would be far from 25 years they have been used on hames; they may have been used for some years more.

Q. Is that of a similar form with the complainants' exhibit—that staple used on the hame?

A. I should think it was about the same thing—the same principle.

Q. Where have you seen them used?

A. In Milwaukee.

Q. Have you sold a great many of those hames with that staple?

A. No, sir; we havn't lately.

Q. Have you ever sold them?

A. Yes, sir.

Q. Did you sell them as early as 1848?

A. I think we did.

Q. Didn't I buy that hame at you store within the last year?

A. Yes. We have them now in stock.

Q. Then you have sold some lately?

A. Yes, sir; we sell them now; occasionally there is a call for them.

Q. Are they on sale generally in harness shops in the United States?

A. I don't think they are; only in such an establishment as ours, running on a big scale, which keep a large assort-
76 ment of everything; smaller establishments don't keep these things.

Q. You are in the employ of Dyer—what is his first name?

A. George Dyer.

Q. You have been in his employ how long?

A. For thirty-two years next month.

Q. You keep a very large supply of all sorts—the largest supply in Wisconsin?

A. We claim to keep the largest assortment in that line of any dealer in the United States.

Q. In all kinds of saddlery?

A. Yes, sir. We don't claim to keep any carriage hardware, only saddlery hardware.

Q. Do you know of any other uses than those which you have mentioned, the thills of wagons and hames, where that staple is used?

A. I could not tell now. I didn't give it any thought. I think some such thing is used in drays—that would cover the same ground as on the shaft; the hook slides in here to hold up the saddle, this would be on top here, while that one is used on the bottom.

Hame offered in evidence by defendant's counsel, marked "Defendant's Exhibit R," P. W.

Cross-examination:

Q. Do you know the use for which those staples, complainant's Exhibit C, are made?

77 A. Yes; I think I do.

Q. As a bail-ear for a pail?

A. Yes, sir.

Q. I want to ask you if you cannot discover some difference in the construction of this Exhibit C, as compared with the defendants' Exhibit A, and as compared with defendants' Exhibit R, being the hame; and if so, state what difference you are able to discover in the three staples.

A. There is a little difference in the shape of it.

Q. State what that difference is.

A. Those two, the one on the shaft and the one on the hame, as near as I can tell, after this bend here they run in a straight direction, and then in a socket, while Exhibit C is bent up on that end, while this one runs out straight, and the same with that one, which runs straight.

Q. Do you discover any other difference, Mr. Fisher?

A. There is a little bend there, too.

Q. If you discover any other difference, please state it.

A. No, I don't see any other difference in them.

Q. I now call your attention to some differences, as it seems to me, in the three staples, and ask you if you don't see them.

I call your attention to the fact that, in Exhibit C, the under side of each point of the tack is beveled on the same side, so that when driven into the side of a pail, the natural tendency of the
78 direction would be upward to the points, would it not? Being beveled on the under side in both points, in driving it into the wood the tendency would be for the points to take an upward direction, would it not?

A. I could not tell about that, because I never used them for any such purpose; but seemingly it seems it would; but so far as my mechanical judgment goes, I could not say positively.

Q. Now I ask you to look at the points of the staple on the thill, and as far as you can observe, state whether there is any such bevel on the points of that staple.

A. It is not on this one.

Q. On the contrary, the points where it comes through the thill is nearly as large as it is on the other side?

A. It is shaved down a little.

Q. Is it not true, in your judgment, that in the thill there was a hole, put through it for these points to come through?

A. Well, I should think there was.

Q. Is there any bevel at all, so far as you can observe, on the points to the staple in the thill?

A. Well, the point is flattened down a little; it is a little lighter than down here; it is half as thick as down here.

Q. You understand me, Mr. Fisher, I am inquiring if you find any bevel on the under side on that exhibi as you do on the under side of Exhibit C, so as to affect its direction when driven into the wood?

79 A. No.

Q. I show you the hame and the staple in the hame, and I will ask you to state to the commissioner if you can ascertain from the examination of the hame whether there is any bevel on either point of the staple; and, if so, on which side is the bevel?

A. There is no bevel at all on the hame.

Q. There isn't any; so there was a hole bored through the hame to receive this staple?

A. Yes, sir; of course.

Q. And on the other side of that it is riveted, is it not?

A. Yes, sir.

Q. State whether it is not true, in your judgment, that the pressure against both staples on the fill and on the hame would be as likely to be in one direction as another, in the ordinary use of the two staples—the pressure would be lateral, as much as up and down.

A. On the hame it is only in one direction.

Q. Up or down?

A. It is outwards; it is half-ways betwixt.

Q. At an angle of 45 degrees?

A. About; yes, sir.

Q. How should you say it was on the thill, Mr. Fisher; where would the pressure be on that?

A. It would be almost straight forward; it would be almost straight.

80 Q. It would be lateral?

A. Yes, sir.

Q. Now, with the explanation of the use for which Exhibit C was intended—namely, to be used as a bail-ear to a pail—where would the pressure be on that—up, down, or lateral?

A. I should say upwards.

Q. Is it not your opinion that the staple Exhibit C, driven into the pail in the way indicated, with the bevel on the two points inclining them both upwards, that it would tend to strengthen the bail-ear by reason of the upward tendency of the points in the wood?

A. It is out of my line; I am not a mechanic in this line; it would require a man more acquainted with wood-work than iron.

Re-direct examination:

Q. Mr. Fisher, in your answer to a question put by complainant's counsel, you said that you thought that the form of the staples in the hame and the thill differed a little from the form of the complainant's exhibit, have you examined the form more particularly of the staple in the thill?

A. I notice that has a little bend-up there, at one, and which I did not notice when the gentleman spoke to me first.

Q. Is not that staple in the thill of the same form with complainant's Exhibit C?

81 A. Yes; that one driven in there seems to be a little different again—it seems to be more straight; that is turned up here a little; and so is this one at this end.

Q. How is it on the other end; are they alike there?

A. Well, I don't see there is any difference at the other end.

Complainant's Counsel: Except on the bevel?

A. At the points; yes, sir.

Q. I speak of the form?

A. I should think the shape being so near alike, there isn't much difference.

Q. Is there any substantial difference in form between the two?

A. I should think there was no substantial difference.

Q. Mr. Fisher, havn't you seen these staples used on thills where the pressure was on the front part of the staple on the

outside; also others where the pressure was on the inside of the front part of the staple?

A. Yes, sir; I have seen them used both ways; I have seen them used inside and outside.

Q. Then the effect would be—in the one case it would be a push, in the other it would be a pull?

A. In one case you can pull this way; and in the other case you can pull the other way more.

JOSEPH FISHER.

82 *Deposition of Henry Mann.*

Henry Mann, being duly sworn, testifies as follows:

Q. Are you one of the defendants in this suit?

A. Yes, sir.

Q. Won't you give us your age, occupation, and residence?

A. My age is 53 years; my occupation is manufacturing; my residence in Milwaukee.

Q. Have you been accustomed to manufacture pails?

A. Yes, sir.

Q. Have you used bail-ears in large quantities?

A. Yes, sir.

Q. Did you ever purchase bail-ears of complainants?

A. I did.

Q. Do the complainants sell machines for the purpose of boring holes in the sides of pails to put their bail-ears in?

(Objected to as incompetent and immaterial.)

A. We have bought one machine of them ourselves for the purpose of boring the holes for these staples; for the point of the staples and for centering the pail at the same sime.

Q. For what purpose is that machine used that they sell?

A. For the purpose of boring preparatory to putting in the ear, so it won't split the stave, and at the same time to put the ear in the proper place in the center.

Q. You recollect when this suit was commenced, Mr. Mann?

83 A. Yes, sir.

Q. Have you used a bail-ear of the same form as complainant's Exhibit C in your establishment, manufacturing pails, since the commencement of this suit?

A. We did, some years ago.

Q. Since the commencement of this suit?

A. No, sir.

Q. You hav'nt used that form of bail-ear at all since the commencement of this suit?

A. No, sir.

Q. Will you produce here the form of bail-ear which you are now using and have used since the commencement of this suit?
A. Yes, sir.

Witness produces a staple which he says they use for bail-ears, and have used since last October, which is marked "Exhibit Mann." P. W.

Q. Is that the only form of bail-ear that you have used since that time?
A. Yes, sir.
Q. Mr. Mann, the points of these staples that have been introduced in evidence here, what is the effect of the diagonal cut in driving the staple into the wood, as to the course that the point will take?
A. The tendency of the point will be outward from the bevel.
Q. How long have you been in the manufacturing business?
A. I have been in the manufacturing business since
84 1860; I am a mechinic myself; learned the trade.
Q. In the old country?
A. Yes, sir.
Q. How long have you known that, by beveling the point, you could thereby force the point in an opposite direction to the bevel, in driving it in a hard substance?
A. I think anybody who would look and think the matter over would see the tendency must be that way; at least, experience will demonstrate it.
Q. How long have you known it?
A. I have known it ever since I knew how to drive a nail.
Q. Mr. Mann, the counsel on the other side has called attention to the fact that in complainant's Exhibit C the lower part below here from the loop rises where the point is bent off; is that true of the staples which you have used?
A. The staples that we manufactured of this kind here (which is offered in evidence, and marked "Mann Bros.," P. W.) are intended to run on a square; they are on a true angle, while the Double-Pointed Tack Co.'s have an acute angle on one and the reverse on the other.
Q. What do you mean by "true angle," "square;" horizontal?
A. Yes, sir.
Q. Do you mean that in the staples that you manufactured that the lower point was at right angles to the body of the staple?
A. Yes, sir.
85 Q. Did you ever use a staple where the lower point made an acute angle with the body of the staple, excepting those staples that you bought of the complainant?
A. We did not manufacture them.

Q. Never did?

A. No, sir.

Q. Q. Did you ever use any except those you bought of the complainant in that shape?

A. No, sir.

Q. Now, Mr. Mann, I wish you would state what difference in form there was between the staples that you manufactured and the staples that you bought of complainant, and which you used previous to October. What was the difference in form between the two staples?

A. The staple of the Double-Pointed Tack Company, the lower prong runs at an acute angle from the body of the staple, while the longer point runs on an obtuse angle; while our staple is intended to run on a square from the body, and the two points run parallel to each other and at right angles to the body of the staple. Now, I would explain here that there was no purpose in doing that, our machine made them in that way—never thought of it. When I heard so much talk about it, I thought of running it in different, and then the reason we made "Exhibit Mann" is, it is just as good as complainant's Exhibit C, every part of it, and it takes one-third less wire to answer the same purpose. I mean by this staple, "Exhibit Mann."

86 Q. Mr. Mann, you have had a good deal to do with horses in your time, havn't you?

A. Yes, sir.

Q. Have seen a good many horses shod?

A. Yes, sir.

Q. Are horse-shoe nails beveled?

A. Yes, sir.

Q. What is the bevel for?

A. They are beveled so that the nail will be driven outward—out in the hoof at a certain point.

Q. You mean by driven out, turned out?

A. Yes, sir.

Q. Is that any new thing?

A. No, sir, that is nothing new; it has been done as long as horses have been shod, I expect.

Q. In carpenter work what is the effect of the bevel in the chisel?

A. The effect of the bevel in the chisel is, that if you drive the chisel into the wood it will drive outward from the bevel or in the same direction as the bevel.

Q. Mr. Mann, if both points of a staple were beveled on the outer side, what would be the tendency in driving that staple into wood?

A. Well, the tendency of these points would be in the same direction as the bevel, both points would come together.

Q. Converge together?

A. Yes, sir.

87 Q. If the points converge together, would it not hold stronger than if they both curved in parallel lines:

A. Yes, sir; it would be stronger.

Q. Would not a staple, where both points were beveled on the outer side, hold stronger than complainant's staple, as shown in Exhibit C?

A. Yes, sir; no doubt of it. We make them like "Exhibit Mann." It would be more difficult to make the machine make them that way. I do not know that we could get the machine to make them. The process is all done in one motion. This is the way it comes out of the machine, just as I point my finger—a hundred in a minute. If we should want to have this on the other side, probably the wire would have to be turned—it would require a different motion. I would make another statement, that these staples, our own staples, "Exhibit Mann;" I put them in differently; some would come in that way, and some this way, into the pail. There is no top or bottom to them—it doesn't make any difference. We have experience now, we have so many, that it makes no difference whether the bevel is on the lower side or on the upper side.

Q. Can you use them indifferently?

A. We use them indifferently; yes, sir; and we have sold a great many, and never gave any direction how they should be used.

Q. A great many of "Exhibit Mann?"

88 A. Yes, sir.

Q. Since you have been a mechanic and manufacturer, haven't you always known staples to be used with beveled points?

A. Yes, sir; they have been used as long as I can remember.

Q. Haven't you always known, since you have been a manufacturer or a mechanic, in what direction the bevel would force the points of a staple?

A. Well, I have made that statement several times—twice. The direction of the points would be in the same direction as your bevel.

Cross-examination continued till Saturday, July 5th, at 2 p. m.

July 5th, 2 p. m.

Parties appeared by counsel, as follows:

Complainant by N. S. Murphey.

Defendants by Wm. P. Lynde.

The cross-examination of Mr. Henry Mann was then proceeded with, as follows:

Cross-examination:

Q. State what you mean by the machine you say you purchased of the complainant for boring the holes in the pail for the ears.

89 A. When I first bought these ears from the Double-Pointed Tack Company, they told us that they had a machine to—I don't mean bore—there is something like a brad-awl, like two points or two brad-awls; by forcing the foot down on a lever these two brad-awls come down, and together make the two holes into the pail.

Q. Make these two holes here in the side of the pail where the ear is to come?

A. Yes, sir.

Q. They simply mark the spot, you mean?

A. They make a little hole so you can put the ear in, so you can afterwards drive it in.

Q. How deep a hole do they make?

A. I don't remember; we haven't used it much. We haven't used the machine much, and we have got it there yet.

Q. The machine for punching these holes, or making the mark on the spot, is used in connection with and as a part of the machine you speak of that does the centering of the pail?

A. Yes, sir.

Q. You mean by the center, the diameter of the pail?

A. Yes, sir.

Q. It makes an impression on one side?

A. I don't remember whether it makes that on both sides at once or or one side first and then on the other. It is done by a lever you work with your foot.

90 Q. Is not the primary purpose of the use of that machine of which you speak to take the diameter of the pail, and indicate by these prongs where the bail-ear is to come in, rather than to make any hole for the receipt of the bail-ear?

A. Well, no. Some people are afraid that these ears will split them, and it does once in a while split the stave, and for that reason holes are made; but some people use them, and some don't.

Q. Do you use your machine now?

A. No, sir.

Q. Did you ever use it much?

A. We have used it quite a while, until the men thought they could do the same kind of work, or more work, without the machine.

Q. Do the points you speak of make a hole upon the same principle that a gimlet makes a hole?

A. No, sir.

Q. It is a mere indentation?

A. Just like these brad-awls—to make a hole and pull it out again.

Q. It didn't go in very far, did it?

A. It went in probably, I should think, a quarter of an inch—perhaps more.

Q. That is a machine entirely separate and distinct, as you understand it, from this patent device described in complainant's patent—the staple itself?

A. It is entirely separate.

91 Q. Now, you say that since this suit has been commenced you have not manufactured any bail-ears like those described in complainant's patent, but have made instead such ears as are indicated in the two staples shown in "Exhibit Mann;" is that so?

A. Yes, sir.

Q. Why did you change the form that you were making before into the one as shown in "Exhibit Mann?"

A. We intended to change long before you commenced this suit—long before anything was said about this suit. We didn't have the machine ready, but we had it ready before the suit was commenced, and made some of these staples, and found they were just as good and cost a good deal less money.

Q. Have you given all the reason you have for changing the shape of the staple after the suit was brought?

A. Yes, sir; I didn't change it after suit was brought, I changed it before.

Q. But you didn't manufacture it before, did you?

A. Yes, sir.

Q. How extensively?

A. Well, we manufactured them as fast as we could make them—as fast as we could use them.

Q. Havn't you already testified that since this suit was commenced you commenced the manufacture of staples such as are shown in "Exhibit Mann?"

A. I said we commenced to use these in October, and you commenced the suit in November, I believe.

92 Q. State whether you commenced manufacturing and using the staple marked Exhibit Mann before or after correspondence had by your firm with the Double-Pointed Tack Company about the use of these staples.

A. Well, the correspondence dates back a long time.

Q. Please answer the question. Was it before or after the correspondence?

A. We commenced to make these staples here after the correspondence commenced.

Q. The correspondence dated way back to January and February, 1878, did not it?

A. I believe so.

Q. Is it not true, Mr. Mann, that you were led to the manufacture and use of the staple indicated in Exhibit Mann with a view to avoid the objection which the complainant made to your manufacture of the staple that you used before that time?

A. No, sir; there is too much money in consideration; the cost is one-third less, and one-third less material is needed. That is the main expense, and that is the reason why we make them.

Q. Why didn't you commence making them before October, 1878, if they involved so much less expense?

A. Because we didn't have the idea; we didn't think of it.

Q. When did you first get the idea?

A. That is more than I can tell. I don't know how mechanics get an idea, but when they get it they think a long time
93 whether it would be advisable to make a change.

Q. It was, at all events, after the complainant found fault with your making the staple?

A. I could not say positively; I cannot tell when I had the idea first; after I have an idea, I think the matter over in my mind for a long time before I say anything to my brother.

Q. You never reduced it to practice until after the correspondence and complaint were made by the complainants here against you for the use of the staple?

A. That I am sure of.

Q. What do you claim to be the difference in the two staples shown on Exhibit Mann, if any?

A. There is no difference; they are both bail staples; both made in the same way?

Q. One is made of iron, and the other of copper wire?

A. They are both made of the same kind of wire, and this is coppered and this is not.

Q. What do you claim to be the difference in construction, shape, and utility, if any, between complainant's Exhibit C and defendants' Exhibit Mann Bros.?

A. The difference in the construction between the two kinds of staples is this, Mann Bros.' Exhibit: The two prongs run on a square line from the body of the staple, while complainant's Exhibit C, the lower prong runs on an acute angle from the body of the staple, and the upper prong runs on an obtuse an-
94 gle from the body of the staple; the difference in utility, there is none; they both perform the same office.

HENRY MANN.

Testimony closed. Defendants rest their case.

95 "EXHIBIT WALTON," P. W.

UNITED STATES PATENT OFFICE.

Jonathan Walton, of Brooklyn, New York.

Letters Patent No. 77,853, dated May 12, 1868; antedated April 30, 1868.

IMPROVEMENT IN BAIL-EARS FOR PAILS.

(The Schedule referred to in these Letters Patent and making part of the same.)

To all whom it may concern:

Be it known that I, Jonathan Walton, of the city of Brooklyn, in the county of Kings, and State of New York, have invented a new and useful Improvement in Bail-Ears for Pails; and I do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings, forming a part of this specification.

This invention relates to a new and useful improvement in bail-ears for wooden pails, and it consists in constructing the ears of wire, bent in proper form, and attaching them to the pail by clinching, as will be hereinafter described.

The present mode of attaching bails to pails is very defective. The wooden pails have simply thin mental plates attached, perforated with holes to receive the ends of the bail, which are bent to enter and hook into them.

Figure 1 is a side view of a wooden pail having my improvement attached to it.

Figure 2, a vertical section of a portion of a wooden pail having my improvement applied to it.

A, fig. 1, represents a wooden pail having my improved ears, B, attached to it. These ears are constructed of wire, bent so as to have an eye, *a*, and two prongs, *b b*, the latter being inserted in holes in the sides of the pail, passing entirely through the same, and clinched at the inner side, as shown clearly in fig. 1. These ears B are further secured to the pail by staples, C, which encompass the ears just below the eyes *a*, and are also clinched at the inner side of the pail, as also shown in fig. 1.

The ears B are bent or curved so that the eyes *a* will project outward from the side of the pail, and afford room to admit of the ends of the bail D being passed through them and bent in hook-form, as shown in fig. 1.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

The bent wire bail-ears B, constructed as described, the two prongs *b b*, passing through the side of the pail A, and clinched upon the inner side, and held in position by means of the staple C, encompassing said ears below the upward-projecting loop *a*,

their inner ends also passing through the side of the pail A, and clinched upon the inner side thereof, as herein shown and described.

JONATHAN WALTON.

Witnesses:
WM. F. MCNAMARA,
ALEX. F. ROBERTS.

96 (Here follows diagram marked page 96.)

97 "EXHIBIT KRICHBAUM," P. W.

UNITED STATES PATENT OFFICE.

J. George Krichbaum, of Youngstown, Ohio.

Letters Patent No. 89,666, dated May 4, 1869.

IMPROVEMENT IN EARS FOR WATER-PAILS.

The Schedule referred to in these Letters Patent and making part of the same.

To all whom it may concern:

Be it known that I, J. George Krichbaum, of Youngstown, in the county of Mahoning, and State of Ohio, have invented certain new and useful improvements in Water-Pails; and I do hereby declare that the following is a full and complete description of the same, reference being had to the accompanying drawing making part of this specification, in which—

Figure 1 is a perspective view of the pail.

Fig. 2, a detached section.

Like letters refer to like parts in the different views.

The nature of this invention relates to the ears of a water-pail, said ears being constructed of iron and attached thereto without nails or screws, as set forth.

In fig. 1, A represents an ordinary wooden pail, of which B are the ears and C the bail; said ears are made of wire twisted into a loop *a*, in which the bail is hooked; one end of said wire is turned out at a right angle, forming a spike or nail-like prong D, fig. 2, whereas the opposite end is continued down below the twist, and also terminates in a right-angled prong E, and in the same direction.

These ears are secured to the pail by first boring holes therein in which the prongs are inserted, which being done *they are then clinched down upon the inside*, as shown at C, fig. 1, all of which is easily and quickly done, thus providing the pail with a simple, neat, and durable pair of ears, stronger and much less expensive than those in ordinary use.

The post B′ of the ear is twisted, which prevents the loop *a* from opening or spreading by the strain to which it is subjected

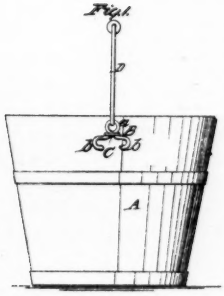
~~"Exhibit Walton" Pro~~

J. Walton,

Bail-Ear for Pails.

No 77,853. Patented May 12, 1868.

Fig 1.



No. 323.
Double Printed
Case &c.
v.
Two Rivers Manufg
Co. et al
page 96.

Fig 2.

Witnesses:
Thos Tysall
J A Service

Inventor:
Jonathan Walton
Per Munn & Co
attorneys

96

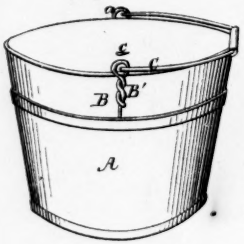
~~"Exhibit Krichbaum" Pat.~~

J. G. Krichbaum.

Water Pail Ear.

No. 89,666. Patented May 4, 1869.

Fig. 1.



No. 333.
Double Pointed Tack Co.
v.
Pass River Manuf'g Co. et al.
page 98.

Fig. 2.

Witnesses;
J. H. Burridge
Frank Baldwin

Inventor;
J. George Krichbaum

98

in using; and by this means the only fastening required to secure the ear to the pail are the prongs D E, which are arranged one above the other, the lower one passing under the hoop; by this means of attaching the ear to the pail, greater strength and security are obtained than in the ordinary way.

What I claim as my improvement, and desire to secure by Letters Patent, is—

The twisted ear, with prongs arranged as described, in combination with the pail, in the manner and for the purpose set forth.

J. GEORGE KRICHBAUM.

Witnesses:
JOHN BAYERS,
OWEN ENNIS.

98 (Here follows diagram marked page 98.)

99 "EXHIBIT CAVEAT," P. W.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files of this office of the caveat of A. Miller, filed August 23, 1873, for bail-ears for well-buckets.

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and third.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy of the files of this office of a caveat of A. Miller, filed August 23d, 1873, for bail-ears for well-buckets.

In testimony whereof, I, W. H. Doolittle, Acting Commisioner of Patents, have caused the seal of the Patent Office to be
100 hereunto affixed, this seventh day of July, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

I, Alfred Miller, of Cincinnati, Hamilton county, State of Ohio, have invented some new and useful improvement in bails for well-buckets, of which the following is a specification:

Nature and objects of Invention.

My invention consists in the 1st part of a new method of forming the socket of the bail, through which the hook passes; and my invention further consists in the 2d part, of a peculiar way of turning the bail-ears and for the shanks of the same, which permits of their being driven into the well-bucket without preparatory boring. In the accompanying drawing,

Fig. 1, is a prospective view of my bail and bail-ears.

Fig. 2, being the section of the bail immediately to one side of the socket for the hoop.

General Description.

Heretofore in the formation of sockets for hoops of bails, it has been customary to forge the center piece from a bar of iron, wide enough for the socket; the rounded ends being forged down for welding to the round part of the bail. This has been attended to with unnecessary expense and trouble, and to obviate this, I make my bail of one piece of round-iron A, with the socket projection B bent so as to embrace the round bar over which it is welded, as clearly shown in Fig. 2. After welding, the socket can be punched through for the hook, in the manner shown in dotted lines Fig. 2. The bail-ears D are so formed that at the point *d* the iron is doubled together closely so that the bail-ear may be hammered in the bucket without bending or misshaping the eye, and the ends *d'* are flattened down tapering so as to permit of driving.

Claims.

1st. In the formation of bails for buckets, the socket, B, when bent round a bail and welded for the reception of the hook, substantially as and for the purpose specified.

2d. The bail-ear, D, when formed of sharpened ends, *d'*, and bent so as to have double thicknesses close together, to hammer upon at *d*, substantially and in the manner described.

In testimony of which invention, I hereunto set my hand.

ALFRED MILLER.

Witnesses:

FRANK MILLWOOD,
J. L. WAITMANN.

102 (Here follows diagram, marked page 102.)

No. 323.
Double Pointed Hook Co. v. Two Rivers Manufg Co. et al.

page 102.

A. Miller,

Bail Ear.

Caveat.

Filed Aug. 23, 1873

Fig: 1.

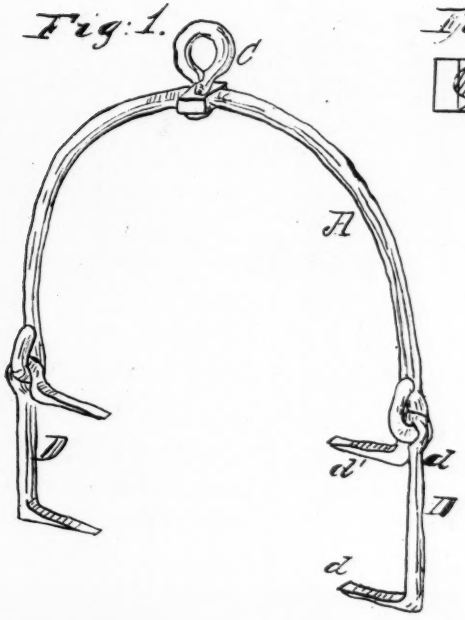
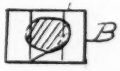


Fig: 2.



102

103 "EXHIBIT MILLER *vs.* MILES." P. W.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files of this office of the deposition in the matter of the interference, Miller *vs.* Miles, for bail-ears for pails.

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of the independence of the United States the one hundred and third.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

In the matter of the interference, Alfred Miller *vs.* Purches Miles, improvement in bail-ears for pails.

NEW YORK, *Aug.* 30, 1876.

Messrs. LEGGETT & LEGGETT, *Attorneys for A. Miller:*

SIRS: Please take notice, that on Friday, September 1st,
104 1876, at the office of E. Boyden, Esq., justice of the peace at Marlboro, New Hampshire, commencing at 11 o'clock a. m., I shall proceed to take the depositions of John E. Woodward, Charles Buss, E. P. Buss, D. W. Tenney, Nolton, and Tenney, all of Marlboro, aforesaid, witnesses on behalf of the above-named P. Miles, in the aforesaid matter of interference. The said examination will be adjourned from time to time until completed. You are invited to be present and cross-examine the said witnesses.

LEMUEL W. SERRELL,
Attorney for Miles.

Service of copy of above notice acknowleged, this 30th day of August, 1876. LEGGETT & LEGGETT,
Attorneys for Miller.

Before the Commissioner of Patents: In the matter of the interference between the patent of Purches Miles, granted February 10th, 1874, and the application of Alfred Miller for re-issue of letters-patent for bail-ears.

Deposition of witnesses on behalf of Purches Miles, pursuant to the annexed notice, at the office of E. Boyden, Marlborough, New Hampshire, on Friday, September 1st, 1876. Present: Leonard Wellington, Esq., on behalf of Purches Miles, and H. A. Seymour on behalf of Alfred Miller.

Charles Buss:

1st. State your name, residence and occupation, and age?

105 A. Charles Buss; Marlborough, N. H.; machinist; fifty-five years.

2. How long have you resided in Marlborough?

A. I have been here all my lifetime, excepting six years.

3. Do you know William Collins who resided in Marlborough in 1868?

A. Yes, sir.

4. During what years did you know him?

A. I have always been acquainted with him since he was a little boy.

5. How long is it since you have seen or heard of him?

A. It is in the neighborhood of three years?

6. Do you know his present address?

A. No; I do not know where he is.

7. Do you know of his making and using a pail bail and tub ear? If so, describe it.

(Counsel for Alfred Miller objects to this question, as it has no relevancy to the issue in controversy, which is confined to the question of priority of invention as between Alfred Miller and Purches Miles, and hereby gives notice that at the proper time he shall move to strike out all testimony attempted to be adduced to show public use or abandonment of the invention in controversy by third parties. The reasons for making this objection is, that under the law of 1870 the Commissioner of Patents is not authorized to accept any evidence of this character, and under the ruling of the case of Smith *vs.* Perry, reported in

106 the Official Gazette, May, 1876, the Commissioner therein decides that he has not authority to decide the question of public use or abandonment, unless such facts are confessed by the parties to the same.)

A. He made an ear like this, (which counsel for Miles requested to designate as Miles Exhibit H).

8. State if you know who made the one here produced, and is the Exhibit H.

A. I should think it was one that I made.

9. You may state if you know whether said William Collins made any pail bail-ears; if so, how did they differ from the one here produced?

(Objected to for reasons above given.)

A. He did, and they were like the Exhibit H.

10. How was this ear used upon the pail, and what was it for?

A. It was driven through the stave and clinched, and formed an ear to hold the bail.

11. To what extent were these pail-ears publicly used and sold? Tell the number used, and what was done with the pails and tubs upon which they were applied, to the best of your knowledge.

(Objected to for reasons above given.)

A. The first he made he used himself to put on to pails and tubs. The next he made were carried to Mr. Tenney's factory to put on to pails and tubs there; could not tell the number. He let Mr. G. G. Willis, of Swanzey, have some. There
107 were other parties which he let have some, but I am unable to recollect their names or the number.

12. Did you see any pails or tubs with these ears attached?

A. I did; those he put on himself I saw, and those put on by the Messrs. Tenneys I saw.

13. In what year were these pail and tub ears of Collins publicly sold and used as aforesaid?

(Objected to for reasons given above.)

A. I do not remember the year; he made one or two and applied, before he sent on for a patent; he made some after, and was making them right along, and would have made more if he had had funds to do so.

14. You may state who made his application papers for a patent.

A. George F. Buss, of Marlborough, N. H.

And in answer to cross-interrogatories proposed by H. A. Seymour, esq., counsel for Alfred Miller, he said:

1. Have you heard anything concerning the whereabouts of William Collins within the last few months?

A. I have, but nothing that is reliable; some state that he is in Boston and some New York or Connecticut; his wife told me that she did not know where he was.

2. You state that Mr. Collins made a bail-ear like Exhibit H; are you quite certain that it was made of the same shape and material?

108 A. I am; those put on his model were made of brass; I made them myself.

1. Why did you make the first ears which you applied to a model; and was this the model afterwards sent to the Patent Office?

A. Because he thought I could make them a littler neater than he could.

4. You state that he made one or two bail-ears before he applied for a patent; were you referring to these model ears as the ones he made?

A. No; those I referred to were put on to pails and tubs before he applied for a patent.

5. State when he first made and applied a pail-ear like the Exhibit H.

A. It might have been from one to six months before he sent on his model.

6. Did he send on his model with his application papers?

A. I think he did.

7. Did any one offer to furnish him funds to assist him in taking out his patent?

A. No one; unless he succeeded in getting his patent when parties stood ready to assist him.

8. After his case was rejected, do you know that he made a single effort to secure a patent?

A. I don't know that he did after that.

9. Why did he not apply one of his manufactured bail-ears to his model?

109 A. The model being small, the ears were too large for it.

10. How did he make his first bail-ears?

A. Bent them up with vise and pliers.

11. Were the points sharpened; and if so, how?

A. They were, and sharpened with a chisel.

12. When did you make Exhibit H?

A. I cannot tell you how long ago it was.

13. Do you know of your own knowledge that Collins ever sold a bail-ear like Exhibit H; and do you not know that he gave them to the parties named that they might make an experimental trial; and, finally, did not Collins abandon the manufacture of these bail-ears and the parties named abandon their use when they were not forthcoming from Collins free gratis?.

A. I don't know that he did sell any, but do know that he gave them to the parties to put on for trial, and that he abandoned the manufacture of them, and the parties abandoned their use.

14. Then all that Collins did at that time simply amounted to an experimental affair which proved a failure?

A. I don't know as you would term it a failure; the article was all right.

15. Did the pail manufacturer charge an extra price for pails with ears on them like Exhibit H?

A. I do not know that they did.

16. About how many of those ears to pails were applied and sold prior to his application for a patent?

110 A. I don't know that any were sold, but that some of them were used.

17. Do you know that any pails with these ears on them were sold after he sent on his application for a patent?

A. I don't know that any were sold, but I saw them packed in with other pails that were to be shipped.

18. Was Mr. Collins in your employ at that time; and if so, state what wages you paid him.

A. He was, and I paid him from one dollar and a half to two dollars a day. Have paid him as high as three dollars a day.

19. Did he own or rent a house at that time?

A. He owned a house.

Direct resume:

15. Did you consider Mr. Collins a man of property at that time?

A. I think he had from four to five hundred dollars in his house above the mortgage.

16. How much, in your judgment, would a machine cost to manufacture these ears such as Collins'?

A. I think from three hundred to five hundred dollars.

17. Do you know why Mr. Collins ceased to manufacture pail and tub-ears?

A. On account of want of funds to do it with.

CHARLES BUSS.

Recalled:

111 18. Had you any pails in your shop about the year 1868 with the Collins ears on in use; if so, how many?

A. I had; but exactly how many I cannot state.

19. How long did you use pails with that kind of ears in your shop?

A. I cannot tell how long, but they were used until worn out.

20. Where did you get them, and of whom?

A. I think Mr. Collins made them in my shop and put them on.

CHARLES BUSS.

Daniel W. Tenney:

1. State your name, age, residence, and occupation.

A. Daniel W. Tenney; age, forty-one years; Marlborough, N. H.; woolen manufacturer.

2. Did you ever manufacture tubs and pails; if so, when?

A. I did manufacture both tubs and pails along from 1860 to 1870.

3. Who was in business with you, if any one, at that time?

A. Wm. Tenney.

4. Do you know William Collins who resided in Marlborough in 1867 and 1868?

A. Yes, sir.

5. During what years did you know him?

A. I have known him some fifteen or twenty years.

112 6. How long is it since you have seen or heard of him?

A. I cannot state exactly; I have not seen him for a year or more.

7. Do you know his present residence?

A. I do not.

8. Do you know of his making and using a pail and tub-ear? If so, tell what it was, and describe it.

A. I do know of his making ears like Exhibit H.

9. Did those ears which he made vary in size, or were they alike?

A. They varied in size.

10. How *as* the ear used upon the pail?

A. Drive through the stave and clinched.

11. To what extent were those pail-ears publicly used and sold? Tell the number used, and what was done with the pails upon which they were applied, as far as you know.

Counsel for Miller objects to the question, as it has [—] bearing on the issue. It relates solely to the question of public use, which matter cannot be considered by the Patent Office; and hereby gives notice that at the proper time he shall move to strike out the testimony of Mr. Tenney and all other testimony of like character.

A. I should think we put them on to ten to fifteen nests of tubs, and from two to three dozens of pails, which we sold
113 to E. Murdock, Jr., of Winchendon, Ms.; three tubs in a nest.

12. Where were these ears put on the pails?

A. In our shop.

13. Do you know of any tubs or pails being used in this vicinity, with those ears on them?

A. I do. Mr. Collins was the only one I knew of using them.

14. Do you know what became of those that Mr. Collins so put on and used?

A. I could not swear for certainty. Mr. Collins' stuff was all sold at auction on the common at Kneu, and I presume those were sold with them.

15. In what year were those pail and tub ears of Collins' publicly sold and used as aforesaid?

A. In the early part of 1868.

16. Did you know about Mr. Collins applying for a patent on those ears—about time?

A. I did.

17. You may state what you know about it.

A. Mr. Collins came down to our shop with the ear, and put on some; we thought it was a good thing, and offered to furnish

the money to obtain a machine and manufacture them, provided he could obtain a patent—as he had no money himself.

18. What did you think of those ears? Should you have used them if you could have got them?

A. I think I should.

114 Cross-examination:

1. When did Mr. Collins leave town, and why did he leave?

A. I cannot state exactly when he left, I think, within two years. On account of financial and family affairs.

2. Was the bail-ear made by Collins in 1868, like Exhibit H, as regards size, shape and material?

A. I should think it was, only as regards size, which varied.

3. State when he first applied bail-ears like Exhibit H, to tubs or pails.

A. In the fore part of 1868, I think.

4. Are you quite positive that he did not apply them during the latter part of 1867?

A. I am not.

5. How long before he applied for a patent was it that he applied these bail-ears at your shop?

A. I think he had applied for a patent before he put them on at our shop.

6. I now repeat my former question. Are you quite positive that he did not apply them during the latter part of 1867?

A. I think he did not.

7. Did you pay Collins anything for the bail-ears he applied at your shop?

A. Not that I know of. We furnished the wire and he made them.

8. Was not that use an experimental one for Collins' benefit?

A. It was for the benefit of Collins, and myself, and partner.

115 9. Do you know that any of the tubs and pails furnished with bail-ears like Exhibit H were ever used; if so, please state when and where?

A. Yes; Mr. Collins used them here in 1868.

10. Do you know that any of the pails or tubs furnished with bail-ears like Exhibit H, and sold by your firm, were ever used?

A. I do not.

11. To whom were such pails or tubs sold?

A. E. Murdock, Jr., Winchendon, Ms.

12. State whether they preferred this bail here to the old one, and did that firm desire that you should continue to apply bail-ears like Exhibit H?

A. They preferred the old ones, and did not wish us to continue using ears like Exhibit H.

13. Did the firm of E. Murdock, Jr., purchase a greater portion of the tubs and pails manufactured by you?

A. I think they had half, or more, of what we manufactured.

14. Was Collins possessed of any property in 1868?

A. He had property in his hands, but I do not think he was worth anything.

15. As a matter of fact, did he not build a house worth over twenty-five hundred dollars about that time?

A. He did.

16. Was he at that time getting better than ordinary wages?

A. I think he was.

17. During the years 1868, 1869, 1870, and 1871, did you ever see a bail-ear like Exhibit H with a washer applied to one
116 [of] its prongs?

A. Not that I know of.

Direct resume:

19. Did you ever see the paper (Exhibit B) before to day; if so, when and where?

A. I have seen it before in this place; Mr. Collins had it, about the time it was returned from the Patent Office.

20. Why did E. Murdock, Jr., prefer tubs and pails with the old ears rather than with those Collins made?

A. Because he shipped most of his wares, and preferred the old style ears on that account.

21. How much property did you consider that Mr. Collins was worth in the year 1868?

A. I do not think he was worth anything.

D. W. TENNEY.

Counsel for Miller hereby consents that the testimony here taken may be admitted, although taken after the day set by the office for closing the testimony on behalf of Miles.

H. A. SEYMOUR,
Attorney for Miller.

STATE OF NEW HAMPSHIRE, *Cheshire.* } *ss:*

At Marlborough, in said county, on the first of September, 1876, before me personally appeared the above-named Charles Buss and Daniel W. Tenney and made oath that the foregoing deposition by them subscribed contains the truth, the
117 whole truth, and nothing but the truth. The said depositions are taken at the request of Purches Miles, at the time and place named in the notice hereto attached, to be used upon the hearing in the matter of the interference between Alfred Miller and Purches Miles, before the Commissioner of Patents.

The said Alfred Miller was duly notified, as appears by the original notice hereto annexed, and attended by H. A. Seymour, Esq., his counsel.

E. BOYDEN,
Justice of the Peace.

Ex'd: L. M.; F. F.

In the matter of interference in the U. S. Patent Office, Alfred Miller *vs.* Purches Miles. Improvement in bail-ears for pails.

NEW YORK, *July 11th*, 1876.

Messrs. LEGGETT & LEGGETT,
Attorneys for Alfred Miller.

SIRS: Please take notice that on Monday, July 17th inst., commencing at 11 o'clock a. m., at my office, 76 Chambers street, in this city, and before a competent officer, I shall proceed to take the depositions of the parties named below, as witnesses on behalf of Purches Miles in above-named matter of interference. The said examination will be adjourned from time to time until completed. You are invited to be present and cross-examine the said witnesses.

LEMUEL W. SERRELL,
Attorney for P. Miles.

118 Witnesses: HENRY W. PUTNAM, Bennington, Vt.
LEVI BRADBURY, " "
WM. T. WRIGHT, New York.
MARY MILES, "
PURCHES MILES, "
CHARLES G. COLE, Bennington, Vt.

Service of a copy of above notice accepted this 12th day of July, 1878.

LEGGETT & LEGGETT,
Attorneys for Miller.

Before the Commissioner of Patents.

In the matter of interference between the patent granted to Purches Miles February 10, 1874, for bail and ears for pails; and the application of Albert Miller for re-issue of patent granted to him April 14, 1874, for similar subject-matter of invention.

Depositions of witnesses examined on behalf of Purches Miles, pursuant to the annexed notice, at the office of Lemuel W. Serrell, Esq., No. 76 Chambers street, New York, N. Y., on Monday, the 17th day of July, 1876.

Present, Lemuel W. Serrell, Esq., on behalf of Purches Miles, and Henry A. Seymour, Esq., on behalf of Albert Miller; Mr. Miles.

Jonathan Walton, being duly sworn, deposes and says, in answer to interrogatories proposed by Lemuel W. Serrell, Esq., counsel for said Miles, as follows:

119 Ques. 1. What is your name, age, residence, and occupation?

Ans. My name is Jonathan Walton; I am 48 years of age; I reside at 22 Canton street, Brooklyn.

Ques. 2. Have you ever obtained any patent upon wire ears for pails; if so, when?

(Mr. Seymour, in behalf of Mr. Miller, makes the following objection: Objected to on the ground that there is no relevancy to the issue.)

(L. W. Serrell, on behalf of P. Miles, replies that this witness is introduced to show the state of the art, in accordance with the preliminary statement of Mr. Miles.)

(Mr. Seymour replies that the rule of practice in the Patent Office fails to provide for any statement by third parties to show such a state of facts. The history of the invention in controversy is all that is allowable in a preliminary statement.)

(Counsel for Purches Miles now gives notice that a motion will be made at a proper time that this interference will be dissolved, on the ground that it has been improperly declared by the Patent Office, and relating to matter in existence before the date of the invention of either of the parties to this interference.)

Ans. I am the party that obtained this patent, No. 77,853, dated May 12, 1868.

Ques. 3. Previous to applying for that patent, did you make wire pail-ears in any other form than the form shown in the patent?

(Counsel for Mr. Miller objects on the ground that
120 the law authorizes the Commissioner of Patents to admit evidence only to prove a single fact, and that is priority of invention. See Smith *vs.* Perry, O. G., April 11, 1876.)

(Counsel for Miller here states that he shall object to all testimony attempted to be introduced to show a public use of the invention in controversy.)

(Counsel for Miles replies that the evidence here introduced relates to a patented article.)

(Counsel for Miller replies in return that the patent referred to is the best evidence and the only evidence that will be considered by the office relative to the invention of Walton.)

(Counsel for Miles replies that no such rule exists in the Su-

preme Courts or the district courts of the United States, and the Patent Office, in matters of interference, is presumed to be governed by the same general rule.)

(Counsel for Mr. Miller replies that it is a universal rule in the courts and in the Patent Office, as, for instance, in the treatment of extensions and re-issues, patentees can never go back of their patent to determine their scope.)

(Counsel for Miles replies that the general position to be assumed in this case having been indicated by the objection, the Patent Office must determine the question to be submitted, and that further objections or answers appear unnecessary.)

121 (Counsel for Miller here gives notice that at the proper time he shall move to strike out all testimony adduced by Miles to show public use of this invention for more than two years prior to the filing of either of these two applications.)

Ans. Yes, sir.

(Counsel for Miller makes a general objection, and counsel for Mr. Miles repeats his general answer.)

Ques. 4. Do you know any instance before your invention of a wire pail-ear of a new article of manufacture, of a bail-ear for pails made of wire bent to form a loop, and having two penetrating prongs that are clinched?

Ans. No, sir.

Ques. 5. Please state in what shape you made such wire bail-ears?

Ans. I here produce bail-ears to be marked by the notary Miles' Exhibit "A."

Ques. 6. When were these bail-ears used?

Ans. They were made previous to the time that I applied for or obtained my patent, somewhere between 1864 and 1866; they were the first experiments made after I got home from the army.

Ques. 7. Did you have any machine or dies for making the wire bail-ears like Exhibit "A?"

Ans. Yes, sir; I produce these pieces of steel or iron (marked by the notary Exhibit "B.") These are the ones I made use of in shaping up the wire bail-ears, Exhibit "A."

Ques. 8. Did you construct any machine in which to use
122 these dies?

Ans. I did.

Ques. 9. Where is that machine, or parts of it?

Ans. Parts of it are in Brooklyn, in the house where I live.

Ques. 10. In whose possession have Exhibits "A" and "B" been since you made them?

Ans. In my own.

Ques. 11. Are they, or not, in the same condition as they were when you made them previous to 1866?

Ans. They appear to be; and I don't know of anybody who could or did have access to them.

Ques. 12. I notice that the prongs in some of these Exhibits "A" are shorter than others; what was that for?

Ans. Some was from accident and some was from design. In placing them in the machine, I found some of the wires went further and some shorter than others, through the imperfection of the machine; that is the cause of one variation; the short ones were for to economize stock, they only being required to pass through thin metal. I made the long ones long to accommodate themselves to thicker substances. My first idea was to fix them on pails wherever necessary.

Ques. 13. In what way did you apply these wire ears to either wooden or metal pails?

(Counsel for Miller again repeats the objections formerly cited.)

(Counsel for Miles also repeats his answer.)

Ans. Vertically, horizontally; and they were clinched.

123 Ques. 14. Can you produce any of the articles to which you so applied these wire ears?

Ans. Yes, sir. I made the one marked Miles Exhibit "C."

Ques. 15. Is there any preference between the wire ear when applied vertically and when applied horizontally? If so, give your reasons.

Ans. Vertically, the bail would swing both sides of the pail, and if horizontally, it will not; it is limited in its motion in one direction.

Ques. 16. In order to obtain the most reliable ear for wooden pails, in which direction did you, previous to obtaining your patent, prefer to apply the wire ear?

(Counsel for Miller objects for the reasons above stated.)

(Counsel for Miles repeats his answer.)

Ans. In the horizontal position.

Ques. 17. Give your reason for preferring to place the ear horizontally upon the wooden pail.

Ans. I put it so in order to obtain a firmer hold.

Ques. 18. Did you add anything to the wire ear Exhibits "A" and "C," to give the same a still firmer hold in the wood—if so, what?

Ans. I added a staple and clinched it.

Ques. 19. Will you please bend up one of the wire ears like Exhibit "A" into the form referred to in your last answer?

Ans. I have done so; and it is marked Miles Exhibit "D."

Ques. 20. Had you made any machine or dies for bending the wire bails into the form of Exhibit D previous to applying for your patent No. 77,853?

124 Ans. Yes, sir.

Ques. 21. Who did you employ to procure your said patent?

Ans. Munn & Co.

Ques. 22. Did you give them information as to your improvements in wire ears for pails, and allow them to prosecute the application as to them might appear best?

Ans. Yes, sir.

Ques. 23. When the wire ears is bent in the form of Exhibit D, will the bail swing equally well on either side of the pail?

Ans. Yes, sir.

Ques. 24. Can you produce one of the ears that you made by machinery, similar to Exhibit "D."

Ans. I produce one, which is here marked Miles Exhibit "E."

Ques. 25. About when did you make the ears Exhibit "E."

(Counsel for Miller objects for reasons formerly given.)

(Answer repeated by counsel for Miles.)

Ans. About the same time I obtained the patent. I made the machinery and lots of the ears before I received the patent.

Ques. 26. Was Exhibit "C" kept in secrecy, or could it be seen by parties visiting your place?

(Objected to by counsel for Miller on former reasons.)

(Answer repeated by counsel for Miles.)

Ans. I never kept it much of a secret. I used it in my shop. Any friends that came in I showed it to them to

125 get their opinion of it.

Ques. 27. Do you know why Munn & Co. did not show in the drawing and specification that they prepared for your application for patent the ears Exhibit "A," applied as on Exhibit "C?"

Ans. I do not.

Ques. 28. Do you know whether or not your model in the Patent Office showed wire ears standing both horizontally and vertically?

Ans. No, sir; I do not.

Cross-examination by Mr. H. A. Seymour, counsel for Miller:

X Ques. 1. Exhibit A, you state, are imperfect bail-ears, from the fact that the prongs are made of all lengths?

Ans. Not necessary imperfect bail-ears, but they show imperfections in the machinery; they were designed to be of different

lengths to suit different articles to which they were to be attached.

X Ques. 2. Did the machine make these bail-ears of different lengths designedly or accidentally?

Ans. Both ways.

X Ques. 3. That machine must been of unfortunate construction, then?

Ans. No, sir; in the machine the rollers that fed in the wire were adjusted so as to slip, and thereby not feed it in so far.

X Ques. 4. You state these prongs were made of dif-
126 ferent lengths both accidentally and designedly; please state the peculiarity of your machine whereby a quantity of these bail-ears would be made of prongs accidentally of different lengths, and then again another quantity would be made with prongs of different lengths designedly.

Ans. That would not occur when the machine was in perfect order. These here you will observe were made in an experimental manner, but sometimes I had a short piece of wire and sometimes a long piece of wire to start on; then when I came to the end of a piece of wire the prongs of the ear would be shorter, the other part remain the same.

X Ques. 5. Is the machine you now have in your possession the same as when first constructed?

Ans. Yes, sir; parts of it.

X Ques. 6. That machine, then, as constructed was made as you state for experimental purposes, and was not capable of turning out merchantable bail-ears?

(Question objected to by counsel for Miles as not in accordance with witness' previous statement.)

Ans. I could make a merchantable bail-ear, but it would not be economy to use it; I could not make a living at it.

X Ques. 7. What kind of wood is usually employed in the manufacture of buckets?

Ans. I don't know.

X Ques. 8. Would you consider that that bail-ear Ex-
127 hibit "A," with its short, unsharpened prongs, is adapted to be secured to a wooden pail or bucket?

Ans. I should say no; that is not what it is designed for.

X Ques. 16. Did you ever secure one of these like Exhibit "A" to a wooden pail prior to the grant of your patent?

Ans. Yes, sir.

X Ques. 10. How did you apply it?

Ans. As shown in Exhibit C.

X Ques. 11. You state that you use staples in connection with bail-ears constructed like Exhibit A.

Ans. The staples were applied to the ears like Exhibit E.

X Ques. 12. In experimenting, you finally deemed bail-ears shown in Exhibit E as a preferable form of ear?

Ans. Yes, sir.

X Ques. 13. These ears when applied to pails you were obliged to reinforce by a staple?

Ans. You are not obliged to; but you do reinforce them.

X Ques. 14. Would not the swinging movement of the pail tend to break off the prong of the bail-ear made like Exhibit A, unless a staple were applied?

Ans. Yes, sir.

X Ques. 15. When you applied for the patent No. 77,853, how did you make your model?

Ans. I bent it up by hand.

X Ques. 16. At that time what were you doing with ears made like Exhibit "A."

Ans. I was not doing anything particular; I was just experimenting.

128 X Ques. 17. Would a bail-ear made like Exhibit E tend to striaghten without the application of a staple?

Ans. A staple must make it stronger.

X Ques. 18. Did you make a machine to manufacture the bail-ears shown in your patent No. 77,853?

Ans. I did, sir.

X Ques, 19. In making that machine did you use a portion of the machine first made to make bail-ears like Exhibit A?

Ans. No, sir.

X Ques. 20. What became of the machine?

Ans. As I wanted to use parts of it; I did so for other purposes.

X Ques. 21. You then abandoned your first idea as shown in Exhibit A, and turned your attention to the manufacture of bail-ears like Exhibit E?

Ans. Yes, sir; I left it and went on with somethig else.

Re-direct, to L. W. Serrell, Esq.:

Red. 22. Did you have Ex. "C" in practical use from the time you made it up to the time you obtained your patent?

(Objected to by Mr. Seymour, counsel for Mr. Miller, upon former reasons.)

(Answer repeated by Mr. Serrell, counsel for Mr. Miles.)

Ans. Yes, sir.

Red. 23. To what extent did you make and sell bail-ears of the shape shown in your patent?

Ans. I did not make a great many; I mader perhaps

129 25 or thirty gross of them.

Red. 24. About how many bail ears did you make like Ex. A?

Ans. I have brought here all that I can find. There are here 23; I might have made from 50 to 150 more of them. You can't tell when you are experimenting, how many you make.

Red. 25. Did you express to anybody at any time, as far as you know, that you gave the bail-ears here produced to the public and abandoned any right to claim them?

(Question objected to by counsel for Mr. Miller upon former reasons.)

Ans. No, sir; I have sold the patent, but never gave the invention to the public.

Red. 26. Have you at any time had sufficient funds to manufacture bail-ears and supply the market, without pecuniary assistance from other parties?

Ans. No, sir.

Red. 27. Is that the reason that you left these ears and went on with something else, as spoken of in answer to cross-interrogatory 21?

Ans. Yes, and some other reasons too. The reason that I left that like Ex. A and went on with something else like Ex. E was because I thought the other was better. The reason that I thought the other better was because I thought it would hold firmer in the wood.

Red. 28. Have you tested the different ears, Ex. A and E, in wood of different qualities, so as to know whether or not they will drive into hard or soft wood?

Ans. 28. No, I have not given much attention to that.

JONATHAN WALTON.

130 STATE OF NEW YORK, } ss:
County of New York. }

At New York, in said county, on the 17th day of July, 1876, before me personally appeared the above named Jonathan Walton, and made oath that the foregoing deposition by him subscribed contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of Purches Miles, at the time and place named in the notice hereto attached; to be used upon the hearing of an interference between the claims of the said Purches Miles and those of Alfred Miller, before the Commissioner of Patents, on the 26th day of September, A. D. 1876. The said Alfred Miller was duly notified, as appears by the original notice hereto annexed, and attended by Henry A. Seymour, Esq., his counsel.

[SEAL.] GEO. T. PINCKNEY,
Notary Public, Kings Co.

131 NEW YORK, *July 17th*, 1876.

William G. T. Wright, being duly sworn, deposes and says, in answer to interrogatories proposed by Lemuel W. Serrel, Esq., counsel for Miles, as follows:

Ques. 1. What is your name, age, residence, and occupation?

Ans. My name is William G. T. Wright; I am 30 years of age; I reside at Bennington, Vermont.

Ques. 2. Are you acquainted with Purches Miles, one of the parties to this interference?

Ans. Yes, sir.

Ques 3. Did he ever show to you, or to Mr. Putnam in your presence, any wire bail-ear for pails; if so, when, and what was it?

Ans. The first time I ever saw a Miles' ear, so called, was in March, 1873, the particular date being March 18, 1873.

Ques. 4. Can you produce the article shown you at that time?

Ans. That is the same ear, but not the same tag, but is a true copy of the original tag. The original tag laid in a drawer and got dirty, and I made a copy of it. I here produce the original ear, marked Miles Ex. F.

Ques. 5. In whose possession has the wire bail-ear, Miles Ex. F, been since March 18, 1873.

Ans. It has been in the safe of the Double-Pointed Tack Co. in Bennington, until recently. I have had charge of the safe.

Ques. 6. Have you seen the wire bail-ear, Miles Ex. F, frequently since March 18, 1873?

Ans. Yes, sir.

132 Ques. 7. Is it in the same condition that it was originally?

Ans. Yes, except a little action of the air on the metal.

Ques. 8. What was the object of Mr. Miles in furnishing Ex. F, March 18, 1873?

Ans. At that time Mr. Miles was out west, several hundred miles from Bennington, and he sent several specimens of this articles as samples, that Mr. Putnam might see them and judge as to their utility.

Ques. 9. Was Mr. Putnam present at the time the first of these wire bail-ears was produced by Mr. Miles, and was it in New York or Bennington?

Ans. I think it was in New York, and Mr. Putnam was present. I also was present.

Ques. 10. How many of these wire bail-ears did Mr. Miles make or produce on the first interview?

Ans. He may have made half a dozen, more or less, simply as samples. I never saw him make any, personally. I kept this Ex. F as a sample of the bail-ears that Mr. Miles produced or

made at that time. I took this sample to Bennington and put it in the safe.

Ques. 11. Are you in the employ of Mr. Putnam, of the Double-Pointed Tack Co.?

Ans. I am.

Ques. 11. As an employee, what is your habit in relation to marking samples that come into your hands?

Ans. It has been an idea of my own for several years, to retain samples of everything I could lay my hands on that had
133 any bearing to the business with which I was connected. I have also been in the habit of marking dates upon such samples.

Ques. 13. Did Mr. Miles desire Mr. Putnam or the Double-Pointed Tack Co. to act in connection with the manufacture of the wire bail-ear Ex. F?

Ans. He did. Mr. Miles was very sanguine that it would be an article of pecuniary benefit.

Ques. 14. Do you know whether any measures were taken in relation to the manufacture of these wire bail-ears?

Ans. Yes, sir; it was either late in the same summer, or early in the fall, steps were taken to get up machinery that would produce them fast and perfectly.

Ques. 15. About when were the articles made by machinery put upon the market?

Ans. In October, 1873; I should say the latter part, perhaps.

Ques. 16. Between March and October, 1873, had Mr. Miles communicated with Mr. Putnam; if so, in what manner?

Ans. He had, both by correspondence and verbally.

Ques. 17. Had Mr. Miles furnished any additional samples during this period?

Ans. He had.

Ques. 18. Which way had he been?

Ans. Mr. Miles was travelling West at that time.

Ques. 19. Are these samples sent by Mr. Miles, when he was travelling West, the ones to which you refer in answer to 8th interrogatory?

Ans. Yes, sir; Ex. F is one of the first; and after that, when he was out West, he sent several other samples.

134 Ques. 20. Do you remember what time in the year it was that Mr. Miles went West?

Ans. I think he went West in December of 1872. I think he had been gone two months before he came to New York and produced this sample Ex. F. He was making trips two or three times a year, and I presume he had been gone two or three weeks before he sent the other samples referred to.

Ques. 21. Has the manufacture of wire bail-ears like Ex. F been very extensive?

Ans. It has not had a general use, but what I should call a pretty general use. We have shipped to one customer as many as six barrels at a time—something over four hundred pounds to the barrel.

Ques. 22. Where are these bail-ears manufactured?

Ans. At Bennington, Vermont.

Cross-examination by Mr. H. A. Seymour, counsel for Albert Miller:

X Ques. 1. Please state your occupation.

Ans. It is bookkeeper and cashier for Henry W. Putnam and the Double-Pointed Tack Co.

X Ques. 2. You state that you first saw Ex. F in March 18, 1873; how do you remember that date?

Ans. I don't remember it any more than my own memorandum on the tag enables me to remember it.

X Ques. 3. How long was this Exhibit F in your safe in Bennington, Vt.?

135 Ans. I could not say. I presume it was put in the safe the same day, and taken out again.

X Ques. 4. Then it was in possession of others about the shop during that period?

Ans. It was in the possession of nobody outside the office.

X Ques. 5. Was it under your personal supervision at all times?

Ans. Yes, sir.

X Ques. 6. About what time was it taken from the office?

Ans. It may have been a week or two weeks after March 18, 1873.

X Ques. 7. As it was only in your possession for two weeks, why have you that assurance that it is the identical bail-ear first sent you?

Ans. From its peculiar construction; it was made by hand, and in formation had peculiarities which machine-made ears would not have; that is, uneveness and roughness.

X Ques. 8. Did you see it made?

Ans. I can't say that I did, but I saw some of the same lot that were made.

X Ques. 9. You state that the first lot consisted of about six, and that they were sent from the West; where were you at that time?

(Counsel for Mr. Miles objects on the ground that the question mistakes the witness' evidence.)

Ans. Exhibit F was made in New York. I was here
136 on a visit at that time. The others kept coming to Bennington after I got back there.

Counsel for Mr. Miller here repeats question 8 and answer to the witness, as follows:

X Ques. 10. "What was the object of Mr. Miles in furnishing Ex. F, March 18, 1873?" "Ans. At that time Mr. Miles was out West, several hundred miles from Bennington, and he sent several specimens of this article as samples, that Mr. Putnam might see them and judge as to their utility." Now, how do you reconcile your last answer with answer to question 8?

Ans. It ain't very easy reconcilable, because I was confused by the question.

X Ques. 11. Were the first lot of samples produced by Mr. Miles all constructed like Ex. F?

Ans. I believe they were; that is, as far as I could detect.

X Ques. 12. Do you think you saw Mr. Miles make one of this lot?

Ans. I believe I did. I think I saw him do it at the bench.

X Ques. 13. In your answer to question 10 you state, "he may have made half a dozen, more or less, simply as samples. I never saw him make any personally;" how do you reconcile that statement with the statement you have just made?

Ans. I have been in the same room and seen him at work on what was said to be bail-ears, as I suppose they were; still I may or may not have actually seen him make bail-ears.

X Ques. 14. Can you distinguish bail-ears from other 137 articles manufactured at your factory?

Ans. Yes, if I had a chance. I could not tell them 10 rods off.

X Ques. 15. You state that these articles were put on the market the latter part of October, 1873; how do you remember the exact time that the sales first commenced?

Ans. I remember how they were placed on the market by the time the sales first commenced.

X Ques. 16. Have you examined your books of late to ascertain such date?

Ans. I have examined them within a short time—say within a month.

Examination adjourned to Tuesday, July 18, 1876, at 10 a. m.

GEO. T. PINCKNEY, *Notary Public.*

NEW YORK, *July* 18, 1876.
OFFICE OF L. W. SERRELL, ESQ.

Continuation of examination of W. G. T. Wright, witness on behalf of Purches Miles.

Same parties present as before.

Cross-examination by Mr. Seymour, counsel for Albert Miller:

X Q. 17. What portion of the month of December, 1872, was Mr. Miles in the West?

138 Ans. As near as I remember, Mr. Miles was West in January and February, 1873, and I think the latter portion of December, 1872.

X Ques. 18. Were you in the habit of opening and reading Mr. Miles' letters to Mr. Putnam?

Ans. Mr. Putnam, when at home, usually opened and read Mr. Miles' letters; when he, Mr. Putnam, was away from home, I sometimes opened and read Mr. Miles' letters.

X Ques. 19. How long did Mr. Miles usually take for his western trips?

Ans. Sometimes he was absent from three to four weeks, and sometimes longer—from six to eight weeks?

X Ques. 20. Do you think he was absent on his first trip eight weeks?

Ans. I think he was; perhaps longer.

X Ques. 21. Was Mr. Putnam at Bennington, March 18, 1873?

Ans. I could not swear that he was; he was either at Bennington, or 108 Chambers street, New York. I should think he was at 108 Chambers street.

Re-direct by L. W. Serrell, Esq.:

R. D. Ques. 22. Is there anything peculiar about Ex. F, that enables you to know that it was made by hand and not by machinery?

Ans. I do not claim to be a mechanic. I have seen a great many ears made by machinery, but am quite sure that Ex. F was made by hand.

139 R. D. Ques. 23. Do you then recognize Ex. F as made by hand, in consequence of your general experience in handling articles of this character, and knowing that those made by machinery were different from Ex. F?

Ans. Yes, sir.

R. D. Ques. 24. Do you know whether or not Miles' bail-ear, as put upon the market, was made of tinned iron wire, like Ex. F, or plain iron wire?

Ans. I do not remember that these ears were made of tinned wire to any extent; they have usually been made of iron wire, which has a copper wash or coating?

R. D. Ques. 25. Does the Double-Pointed Tack Co. or Mr. Putnam manufacture articles out of tinned wire?

Ans. They do; they make double-pointed tacks and staples for different purposes.

R. D. Ques. 26. Are the bottle-stopper fastenings ever made out of wire like this Ex. F?

Ans. They are.

R. D. Ques. 27. About how long were you in New York on the occasion when Ex. F was made, as far as you remember?

Ans. I do not exactly remember; it may have been a few days, or several days.

R. D. Ques. 28. About how long did Ex. F remain in your possession, or where you had constant access to it, in Bennington?

Ans. I can't exactly remember; it was a few weeks or a month; perhaps Mr. Putnam had access to the safe, and I think he took it or borrowed it; I know that I had it back from him,
140 and had it at intervals in Bennington when I had it at that time; I have had it latterly in New York, a few months I should say; I have free access to things that are in my care, both in Bennington and in New York; I go backwards and forwards occasionally; Ex. F was one of the things that was in my general care.

R. D. Ques. 29. Between March, 1873, and the present time, what is the longest period that you remember when you did not see Ex. F?

Ans. I was not in the habit of looking at it every day when in my possession, but I have seen it at intervals, as before stated; the longest interval might have been a few weeks.

R. D. Ques. 30. Did it have a tag attached to it all the time, as far as you remember, with the date of March 18, 1873, upon it?

Ans. It was always my intention, when the sample Ex. F was in my possession, that the tag should not be removed; it never was removed, to my knowledge, except when I removed it to make place for a clean tag.

R. D. Ques. 31. Do you know whether or not Mr. Putnam had the ear, Ex. F, for use while constructing a machine for making such ears?

Ans. I don't think he did, to any extent.

Re-cross-examination by Mr. Seymour, counsel for Albert Miller:

R. X Ques. 32. Please state your method of reasoning, whereby your experience as a book-keeper leads you to detect hand
141 from machine-made bail-ears when you cannot detect any distinguishing features in the two finished articles?

Ans. I do not claim to be an expert in mechanics, under which bail-ears come.

R. X Ques. 33. Question repeated.

Ans. I have handled frequently bail-ears made by machinery, and think I might tell them from ears made by hand.

R. X Ques. 34. You have not had sole possession, then, of Ex. F at all times since March 18, 1873?

Ans. Not constant or sole possession.

R. X Ques. 35. Did you mark a tag and attach it to Ex. F when received, March 18, 1873?

Ans. I cannot say that I marked that tag on March 18, 1873, but it was so near to that date that I count myself safe in placing that date upon it.

R. X Ques. 36. How long after its reception should you think you did mark and attach the tag to Ex. F?

Ans. I should say a few days; I can't give the definite date.

R. X Ques. 37. Do you think it was ten days or thirty days?

Ans. I should say about ten days.

R. X Ques. 38. How many samples have you in your possession marked the same way?

Ans. Perhaps 50 to 100.

R. X Ques. 39. Are you in the habit of waiting several days, and then attaching and marking samples at guess-work?

Ans. I suppose I am liable, like others, to omit things which I am in the habit of doing the same day; but I generally, from other circumstances, am able to fix dates when they are not too far removed.

142 Re-direct, to L. W. Serrell, Esq.:

R. D. 40. Do you recognize in hand-made and machine-made bail-ears any feature of difference in the appearance?

Ans. Yes, a general difference of appearance.

R. D. 41. Can you tell whether Ex. G is a hand-made ear or machine-made?

Ans. I should judge it was a machine-made ear.

WILLIAM G. T. WRIGHT.

STATE OF NEW YORK, }
County of New York, } *ss:*

At New York, in said county, on the 17th day of July, 1876, before me personally appeared the above-named William G. T. Wright, and made oath that the foregoing deposition by him subscribed contains the truth, the whole truth, and nothing but the truth.

The said deposition is taken at the request of Purches Miles, at the time and place named in the notice hereto attached, to be used upon the hearing of an interference between the claims of the said Purches Miles and those of Alfred Miller, before the Commissioner of Patents, on the 26th day of September, A. D. 1876.

The said Alfred Miller was duly notified, as appears by the original notice hereto annexed, and attended by Henry A. Seymour, Esq., his counsel.

[SEAL.] GEO. T. PINCKNEY,
Notary Public, Kings Co.

143 NEW YORK, *July* 18, 1876.

Purches Miles, being duly sworn, deposes and says, in answer to interrogatories proposed by Lemuel W. Serrell, Esq., counsel for Mr. Miles, as follows:

Ques. 1. What is your name, age, residence, and occupation?

Ans. My name is Purches Miles; I am 44 years old; I reside at 468 West 43d street, New York; I am engaged in manufacturing double-pointed tacks, bail-ears, &c. I am secretary of the Double-Pointed Tack Co.

Ques. 2. Please state generally what led to your invention of a bail-ear, now in controversy, and when you devised and produced the same?

Ans. I devised the thing in the month of March, 1873. We furnish woodenware makers and woodware dealers with double-pointed tacks. I noticed first that, with the old kind of ears—the old diamond ears they are called—put on with tacks or nails, were liable to come off, and saw some where they had come off by handling. That suggested that something should be made to take the place of the old ear, and prevent its coming off by handling.

Ques. 3. What did you first make in connection with a wire bail-ear?

Ans. I made a wire bail-ear such as Ex. F.

Ques. 4. Where did you make such ears, and about how many?

Ans. I made them at 128 Chambers street, New York; about half a dozen.

144 Ques. 5. What material did you use in making them?

Ans. I used a piece of Mr. Putnam's soda bottle fastening wire. It was tinned iron wire.

Ques. 6. Did you use this kind of tinned iron wire upon any other occasion for making the bail-ears?

Ans. I might have used it a day or two afterwards; otherwise, I don't recollect of using this kind of wire. I might of made some samples in Detroit, Mich., out of tinned or brass wire. I made some samples there, and put them on to a pail or a stave at Mr. Suttons' pail factory, in Detroit.

Ques. 7. Is Ex. F or not one of the indentical bail-ears that you first made, to the best of your knowledge and belief?

Ans. I should say it was.

Ques. 8. Did you put the transverse notches on the prongs when you first made it?

Ans. Yes, sir, or shortly after; I think it was the same day.

Ques. 9. Had you put across the prongs in other bail ears than the first one the said transverse notches?

Ans. Yes, sir. The notches have not been put on to any except by hand. The latest time—I know we have samples in our

safe that are notched without being sharpened to a point left blunt. I think the tag states on them June, 1873. I have no recollection of any hand-made ears sharpened and with the notches, except the first lot. I think [I] notched two or three of the ears made by machinery. My object in putting on
145 the transverse notches was to have the ear hold without the point coming through. I intended to use them both ways.

Ques. 10. Who saw the first sample like Ex. F.

Ans. I can't state whether I showed it to my wife first, or whether I showed it to Mr. Wright or Mr. Putnam. I showed it to all of these parties the day after I got it up.

Ques. 11. In whose place was it that you made these samples?

Ans. In Mr. Putnam's, or the Double Pointed Tack Co's. place.

Ques. 12. What object had you in showing these bail ears to Mr. Putnam or Mr. Wright?

Ans. I have an agreement with the Double Pointed Tack Co. that if I invent any new article coming in their line, that is to say made of wire, that they were to have the right of manufacturing if they wished to accept the article; and it is my custom to show any article that I have invented to substantial witnesses.

Ques. 13. Did you, between March and October, 1873, make any other bail ears? If so, what did you do with them?

Ans. Yes, sir, I made some few more by hand, and showed them to different parties or manufacturers of wooden ware; I showed them to Mr. Sutton, of Detroit, and his foreman, Mr. Frost, of Detroit; also Mr. Wheatherby, a wooden ware dealer in Detroit; and parties in Grand Rapids, Mich., Comstock & Co.; also Munn & Bros., of Milwaukee; Dunmack & Gould, of
146 Moline, Ill.; also to Clark of Dubuque, Iowa. I sent some of these wire bail ears to Mr. Putnam at New York. I have no recollection of sending any direct to Bennington, still I might have done so.

Ques. 14. Is it customary with the Double Pointed Tack Co. to send articles from New York to Bennington, when Mr. Putnam is to be communicated with concerning them?

Ans. Quite often.

Ques. 15. What was done, and when, in relation to machinery for manufacturing these wire bail-ears?

Ans. After I had shown it to the different manufacturers, and got their approval of it, Mr. Putnam commenced very soon after to make a machine to manufacture them. I think they were put on the market in the latter part of October, 1873.

Ques. 16. Has there been an extensive sale of these wire bail-ears?

Ans. I should say quite extensive; I should say at least ten tons.

Ques. 17. Are you acquainted with the device patented by Alfred Miller, now in interference?

Ans. All that I have seen of it is the drawing in the Patent Office report; never have seen, to my knowledge, the article itself.

Ques. 18. From your experience in the manufacture and use of wire bail-ears, what relative advantages or disadvantages are there between your ear and Miller's?

(Objected to by counsel for Miller on the ground that
147 the witness is not called as a mechanical expert, but simply to give the history of his own invention.)

(Counsel for Miles replies that nothing of that kind is shown by the record.)

Ans. One advantage that mine has is that each prong has a slim single point pointing upward from a straight line, and that when clinched forms a hook, as it were; and another advantage is that I can connect the bail having the eye completely turned, that the ear can be readily fastened to the pail. In Miller's case the eye of the bail has to be left open sufficient to be connected to the eye and then closed up with an instrument, or that the eye or loop, as Miller's drawings show, has to be left open in order to connect the bail. I claim that mine, with the sharp single points, will drive into ordinary wood, such as pails are made of, without boring a hole, and not in most cases split the wood. I should say that Miller's, made of small wire, as I manufacture mine, would get out of shape from driving and clinching and cause the bail to work hard. Another advantage that mine has over Miller's is that, as I should think, he would require a washer on each prong to have the points rivet against it.

Cross-examination by Mr. Seymour:

X Ques. 1. Where were you in December, 1872?

Ans. I was West; I can't tell exactly without looking at my books. I can state now I was in Illinois.

X Ques. 2. Where were you in January, February, and March, 1873?

148 In January I was in Chicago; from January I worked towards Rome, and got here about the 1st of March.

X Ques. 3. Where were you when you made Exhibit F?

Ans. In New York, at 128 Chambers street, our office.

X Ques. 4. Have you had Exhibit F in your possession at any time since March, 1873?

Ans. I have handled it.

X Ques. 5. You then had an opportunity to replace the alleged Exhibit F by one of the machine-made ears that you notched like Exhibit F?

Ans. Yes; if I felt so disposed. If I had it would have been detected, or think it would have been detected by Mr. Putnam.

X Ques. 6. When did Mr. Putnam complete the machine for the manufacture of bail-ears?

Ans. I think in October, 1873, as the first order was filled the latter part of October, the 18th, if I think right.

X Ques. 7. Did you ever see a Miller bail-ear in actual use?

Ans. I think not.

X Ques. 8. So the advantages of your bail-ear over the Miller bail-ear are simply your impressions rather than actual knowledge of the fact?

Ans. Judging from his drawings or sketch that I have seen.

X Ques. 9. How many washers do you use to a bail-ear?

Ans. One to each bail-ear; sometimes we dispense with it.

X Ques. 10. Is the lower prong of your bail-ear like the lower prong of Miller's bail-ear?

Ans. I should say not, by the drawings I have seen.

149 X Ques. 11. How do they differ?

Ans. The lower prong to Miller's ear has a V cut or double point, so that each point will clinch or rivet the lower prong; in mine having only one point pointing upward toward the top of the pail and clinching thoroughly into the wood.

X Ques. 12. Why should the washer be used with the lower prong of Miller's ear, while you dispense with such lower washer?

Ans. If he makes them with the same sized wire as I do, the V cut, seems to me, would not be clinch sufficient without the use of a washer; and said washer to fit the wire or lower prong closely.

Re-direct by L. W. Serrell, Esq.:

R. D. Ques. 19. Has Exhibit F been changed in any particular since you first made it in 1873?

Ans. No, sir.

R. D. Ques. 20. It is necessary in your bail-ear to make use of a washer?

Ans. No, sir; only it makes a better finish.

PURCHES MILES.

150 STATE OF NEW YORK, } ss:
County of New York. }

At New York, in said county, on the 18th day of July, 1876, before me, personally appeared the above named Purchase Miles, and made oath that the foregoing deposition, by him subscribed, contains the truth, the whole truth, and nothing but the truth. The said deposition is taken at the request of Purches Miles, at the time and place named in the notice hereto attached, to be

used upon the hearing of an interference between the claims of the said Purches Miles, and those of Alfred Miller, before the Commissioner of Patents, on the 26th day of September, A. D., 1876.

The said Alfred Miller was duly notified, as appears by the original notice hereto annexed, and attended by Henry A. Seymour, his counsel.

[SEAL.] GEO. T. PINCKNEY,
Notary Public, Kings Co.

I hereby certify that the within depositions of Jonathan Walton, William G. T. Wright, and Purches Miles, relating to the matter of interference between Purches Miles and Alfred Miller, was taken, sealed up, and addressed to the Commissioner of Patents, by me. Exhibits, A, B, C, D, E, F, G, accompanies this package.

GEO. T. PINCKNEY,
Notary Public, Kings Co.

New York, Sept. 16, 1876.

151 *Deposition of Alfred Miller.*

* * * * * *

old. I reside in Cincinnati, in the State of Ohio. I am a traveling salesman.

Question 2. Are you the Alfred Miller named as one of the parties in this interference?

Answer 2. I am.

Question 3. Give a brief history of the invention in controversy.

Answer 3. In the year 1870 I was engaged in partnership in the manufacture of cooper-ware with a gentleman of the name of Firman Jessup. One of the leading features of our manufacture was well-buckets. I think, as near as I can remember, in the fall of 1870, to remedy some evils in the manufacture of well-
152 buckets—we were then using the old style of bucket-ear —which was made of a piece of iron about half an inch wide and about ten inches long, with a curl at the top forming an "eye," the lower portion of the ear being drawn out as thin as an ordinary knife-blade—a case-knfe; the defect in that ear was, in using it, that you had to take off the two bilge-hooks of the well-bucket and then slip the ear between the hooks and the bucket. After the hooks were driven tight, the only means you had to hold that ear on the bucket was by turning over the lower portion of the ear that was drawn out thin over the lower bilge-hook. If that lower clip should break off, or either of the bilge-hooks break, it would render the bucket

useless. I had had quite a number of complaints of that kind, which led me to seek a remedy, which was this bucket-ear which is in controversy. My first conception of this ear was in the fall of 1870. On or about the 15th of May, 1871, I made the first drawing. The second drawing I made was in the latter part of September or first of October, 1870.

[NOTE.—Counsel for Miller here asked the witness if he was correct as to his statement of the date of his second drawing. The witness then proceeded as follows:]

I am positive that my dates are correct. My object in making that second drawing was to explain the ear to Mr. A. B. Lewis, Jr., who was present when it was made. On or about the 22d or 23d of December, 1872, I was in St. Louis, Missouri.
153 My attention was called to a bail-ear known as "Brown's bail-ear," which I will show you.

[NOTE.—Here the witness produces the bail-ear referred to, and counsel for Miller here offers the said bail-ear in evidence, which the notary will identify and annex to the deposition as Miller's Exhibit A.]

Witness proceeds:

Mr. Brown was using this ear on well-buckets which he was manufacturing. I found that the merchants much preferred those to the old ear. I made up my mind that I would have to get up something or other to meet that competition. I left St. Louis on the evening of the 24th of December. On my way home on the 25th of December, I picked up a small piece of wire, of which I made this ear which is in controversy.

[NOTE.—Here witness produces the ear referred to; and counsel for Miller here offers the same in evidence, which the notary will identify and annex to the deposition as Miller's Exhibit B.]

Witness proceeds:

I then thought of taking out a patent. But I am getting on too fast. On or about the 26th of December, 1872, I showed this ear (Exhibit B) to my son William Miller, and requested him to make me one or two, which he did, he being a blacksmith. I then had several of them put upon well-buckets. I then thought seriously of taking out a patent, and, after making the ne-
154 cessary inquiries, I found that the cost was too much for my financial ability. I then let the matter rest, so far as a patent was concerned, until some time in August, 1873,—I don't recollect the date. I then applied for a "*caveat.*"

[NOTE.—Counsel for defence here consents that the original

caveat, or a certified copy thereof, may be introduced at the hearing.]

I was told that the caveat would protect my case for at least one year. On or about the 1st of September, I think, 1873, I had a model bail-ear made and gave it to Mr. A. B. Lewis, Jr., which he took to Washington with the necessary papers for procuring a patent.

Question 4. Did the first and second drawings which you made, represent the invention in controversy?

Answer 4. They did.

Question 5. About what time did you have the bail-ears first made applied to buckets.

Answer 5. About the 26th of December, 1872.

Question 6. To whom did you apply for your "caveat" for bail-ears for buckets?

Answer 6. To Mr. Frank Milward.

And in answer to cross-interrogatories, proposed to him by George H. Knight, as counsel for P. Miles, he saith:

X Question 7. In your answer to question 3, you exhibit
155 an ear made by Brown, and you use this language: "I found that the merchants much preferred those (Brown's ears) to the old ear. I made up my mind that I would have to get up something to meet that competition." Further on, you say, "On my way home, on the 25th of December, I picked up a small piece of wire, of which I made this ear, which is in controversy." You further say, "On or about the 26th of December, 1872, I showed this ear, Exhibit B, to my son." Was this, then, the ear which you got up to meet the competition of the "Brown ear."

X Answer 7. Yes, sir.

X Question 8. Please explain your understanding of the expression "got up," as you there use it?

X Answer 8. By *making it* would be *getting of it up;* that is my idea of it.

X Question 9. Please explain what you mean by "making;" to explain the question: A man may *make* well buckets by the wholesale without the exercise of thought or mechanical ingenuity; again, a man may make a well bucket different in some one or more of its parts to any bucket that had been previously made, and which would necessitate the exercise of mechanical ingenuity or thought. Under which sense was your answer couched when you said "by making?

X Answer 9. My idea of making is this: By taking a piece of metal, and shaping it in form as this is shaped, (Exhibit B,)
156 I would be exercising a certain amount of mechanical

genius, which would produce this ear; that I would consider "making" it.

X Question 10. Did you, on that occasion, viz., December, 1872, exercise "mechanical genius" in making Exhibit "B"?

X Answer 10. I think I did, to a certain extent.

X Question 11. To what extent?

X Answer 11. To the extent of forming and shaping that Exhibit "B."

X Question 12. In your use of the words "got up," do you include the mental conception with the mechanical execution?

X Answer 12. I used my judgment in getting that up, with my conception of the idea, exercising my mechanical genius in producing it.

X Question 13. When; at what date?

X Answer 13. On the 25th day of December, 1872.

X Question 14. Is Exhibit B the identical piece of wire which you allege to have been bent by you at that date?

X Answer 14. It is.

X Question 15. If, as you now say, Exhibit B was an embodiment of a conception which followed, and was caused by your desire to "get up something or other to meet the competition of the Brown ear," please explain what you meant in your allegation, "my first conception of this ear was in the fall of 1870; on or about the 15th of May, 1871, I made the first drawing; the second drawing I made was in the latter part of September or first of October, 1872?"

X Answer 15. I do not thoroughly understand the question, so as to make an intelligent answer.

157 X Q. 16. For the purpose of making my meaning clearer to the witness, his attention is here called to question 12 and the answer there given, which the notary will please read, and the witness state whether said answer is or is not correct.

X Answer 16. In answering that question, I may have given words that I did not understand the meaning of—simply my way of answering. According to my understanding, the answer to question 12 is correct. That is my view of the matter. I do not know of any other words to use to express myself.

X Question 17. Then, if you were to see a cooper make a well-bucket of an old and familiar pattern, you would not say he had "got up" that bucket, would you?

X Answer 17. Well, I can give you the words that I used to use, when I was in business, to the hands. Sometimes I would say to them, I want you to get me up twenty-five dozen of medium well-buckets; at other times I would say, I want you to make me 25 dozen of well-buckets.

X Question 18. Question repeated. Answer it, yes or no.

X Answer 18. I would be just as apt to say that he had got it

up as to say that he had made it. It is a very common thing in a cooper-shop to say that a piece of work is well got up, or that it is well made. Those two words have the same meaning with me.

X Question 19. Is either of the drawings in existence which you allege were made respectively on or about the 15th of
158 May, 1871, and the latter part of September or first of October, 1872?

X Answer 19. Not that I know of. The first drawing was made on paper, and was with my books and papers in the factory on the night of the 5th of December, 1872, when the factory was burned. The greater portion of my books and papers were burnt, and I have never seen that drawing since. The second drawing was made upon a well bucket—an unfinished well bucket in the factory, No. 60 Pendleton street, in the presence of Mr. A. B. Lewis. I am under the impression—almost positive—that that bucket was burned along with the rest.

X Question 20. Is Exhibit B a merchantable bail-ear?

X Answer 20. It is for some purposes.

X Question 21. Please state how you would attach it?

X Answer 21. By driving it right through the stave of the cask or other article of cooperage. This would not drive so well now, (Exhibit B) it wants to be pointed. The reason this was not pointed, I carried it in my pocket, and the points would have been too sharp.

X Question 22. Have cooperage articles been manufactured by or for you, or with your sanction, having ears such as are now in controversy; and if so, for how long, and in what number?

X Answer 22. They have been manufactured by two firms by my sanction, Chas. H. Waters & Co., and Barrett, Waters & Lewis. The other manufacturers have never manufactured by my
159 consent. As to the number that have been used, I have no way of ascertaining. Chas. H. Waters & Co. have been manufacturing since July, 1873. Barrett, Waters & Lewis commenced the first of last January.

X Question 23. Was or was not the ear in controversy the first, to your knowledge, of the cooperage ear, whose loop, body, and prongs were all made of one piece of wire?

X Answer 23. The ear Exhibit B, was the first I ever saw in my life; and I never saw anybody that had seen one either.

And in answer to interrogatories proposed to him by Mr. Seymour for Alfred Miller, he deposes as follows:

Question 24. You say you conceived this invention in 1870. Again, you say you got up this Exhibit B, December 25, 1872. In answer to Question 12 do you mean to say that in1872, when you got up this Exhibit B, you had forgotten your first invention

and that you made an entirely new invention when you made Exhibit B; or do you mean to say that in getting up Exhibit B you simply exercised a limited amount of mechanical skill in taking a piece of wire of limited length and forming it into a bail ear with its loop and prongs?

[NOTE.—Question objected to because leading and suggestive; and because the witness has explicity answered the same points in Question 12.]

Answer 24. When I made Exhibit B, I did not make it with an understanding that it was new. It was bringing out the conception of my idea in 1870. I did not intend my answer
160 to Question 12 should be so construed as to mean anything else than covering my idea of a bucket ear of the Fall of 1870.

ALFRED MILLER.

Deposition of Henry Weitler.

Henry Weitler, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by Henry A. Seymour, Esq., as counsel for Alfred Miller, as follows, to wit:

Question 1. What is your name, age, residence and occupation?

Answer 1. My name is Henry Weitler; I am forty-six years old; I reside in Cincinnati, Ohio; I am a fireman.

Question 2. State whether you are acquainted with Alfred Miller, party in this interference, and how long haye you known him.

Answer 2. Yes; I have known him for about fifteen years.

Question 3. State what, if anything, you know about the invention in controversy?

Answer 3. About three or four years ago I was present at the Engine House No. 4, in Cincinnati, when Alfred Miller took out of his pocket this piece of wire (Exhibit B annexed to Miller's deposition) or something similar to it, and he asked me what I thought it was for. My answer to him was, that I did not know. He told me that it was a bucket bail ear. That was shortly
161 after the burning of his factory.

Question 4. Did Mr. Miller claim that as his invention, said Exhibit B?

Answer 4. Yes, sir.

Question 5. Prior to showing you Exhibit B, had Mr. Miller ever explained his invention to you?

Answer 5. No, sir.

And in answer to cross-interrogatories proposed to him by

George H. Knight, Esq., as counsel for P. Miles, he saith as follows, to wit:

X Question 6. Are you a cooper?

X Answer 6. No, sir.

X Question 7. You have not, then, any special familiarity with bail-ears?

X Answer 7. No, sir.

X Question 8. Are you confident that Exhibit B is an exact *fac simile* of the piece of bent wire which you allege was shown to you three or four years ago by Mr. Miller?

X Answer 8. Yes; I am.

HENRY WEITLER.

162 *Deposition of John R. Cooling.*

John R. Cooling, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by Henry A. Seymour, Esq., counsel for Alfred Miller, as follows, to wit:

Question 1. State your name, age, residence, and occupation.

Answer 1. My name is John R. Cooling; I am forty-five years old; I reside in Cincinnati, Ohio; I am a fireman.

Question 2. Are you acquainted with Alfred Miller, one of the parties to this interference? If so, state how long you have known him.

Answer 2. Yes; about fifteen or sixteen years.

Question 3. What do you know about the invention in controversy?

Answer 3. I do not know about the inventing of it. What I meant to say was, that I did not see Mr. Miller invent it. In 1872 Mr. Miller's factory burned down. Two or three weeks afterwards I was talking to Mr. Miller in the No. 4 engine-house, in Cincinnati. I said to him: "Alf, that was a bad loss for you." He said: "Yes; but I have got something I can make it up with." Said I: "What is that?" He put his hand in his pocket and pulled out a thing like that exactly. It looks like it might be the same piece he showed me.

[NOTE.—Witness here referred to Miller's Exhibit B, lying before him.]

I told him it was a simple-looking thing to make up what he had lost by the fire. He said, "Yes." I asked him
163 what it was for. He said it was an ear for a bucket-bail.

Question 4. Did Mr. Miller claim that ear as his own invention?

Answer 4. Yes; he told me he got it up himself.

Question 5. About what time in 1872 was Mr. Miller's factory destroyed?

Answer 5. It was the fore part of December.

And in answer to cross-interrogatories proposed to him by George H. Knight, Esq., for P. Miles, he saith:

X Question 6. Have you any special familiarity with coopers' devises?

Answer 6. None at all.

X Question 7. State whether you feel competent to recollect the precise shape of a piece of bent wire shown to you four years ago, being for something with which you had no special familiarity?

X Answer 7. Yes, sir; I do. I thought it was so simple a thing to get him out of what he had lost by being burned out; that is the reason I can recollect it so well.

X Question 8. Did you then understand in what manner it was to be attached to the bucket, and do you now?

X Answer 8. Yes, because Mr. Miller showed it to me. I can explain it to you now.

X Question 9. Please do so.

X Answer 9. There were no points on the ear he showed me, but the points were to be sharpened when they were put on the bucket; the points were driven through the stave of the bucket at the top. Mr. Miles told me when he showed it to me that the points were not sharpened, so that he could carry it in his pocket.

JOHN R. COOLING.

164 *Deposition of Henry Carroll.*

Henry Carroll, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by H. A. Seymour, Esq., counsel for Alfred Miller, as follows, to wit:

Question 1. State your name, age, residence, and occupation.

Answer 1. My name is Henry Carroll; I am about fifty years old; I reside in Cincinnati, Ohio; I am engineer of No. 4 Fire Company.

Question 2. Are you acquainted with Alfred Miller, party in this interference; and if so, how long have you known him?

Answer 2. Yes, I am; I have known him twenty-five years.

Question 3. State what you know, if anything, about the invention in controversy in this interference.

Answer 3. About three or four years ago, after Alfred Miller was burnt out, he was down one evening at the No. 4 engine-house. He pulled something out of his pocket, and I asked him what it was, and he said he would not give that for all I would earn for the next ten years. I asked him what it was, and he said

it would answer for a lug for a bucket-bail. What he showed me resembled the Miller Exhibit B now before me. I do not know but it may have been the same one. He said it would answer for a bail-ear for buckets and for other purposes. I think he said it would answer for belts, but I am not positive—lacing belts in machinery.

165 Question 4. When Mr. Miller showed the ear to you, did he claim to be the inventor of it?

Answer 4. Yes, he did.

Question 5. How long after Mr. Miller's factory burnt was it that he showed you this ear?

Answer 5. It was a short time, may be a couple of weeks or a few days. He did not come for the purpose of showing it. He was pulling something out of his pocket, and I reached over and took it out of his hand and asked him what it was for.

And in answer to cross-interrogatories proposed to him by George H. Knight, counsel for P. Miles, he saith:

X Question 6. Can you state the material of the thing you took out of his hand?

X Answer 6. It was made of wire.

X Question 7. State whether it was made of round or flat wire.

X Answer 7. It was made of round wire.

X Question 8. Did you understand how it was to be attached?

X Answer 8. He told me it was for a bail handle. I did not know, until I asked the cooper that was next to me, whether it would answer the purpose.

X Question 9. Did you then understand?

X Answer 9. Yes; when he explained it, and showed me how it would work. HENRY CARROLL.

166 *Deposition of Francis Henn.*

Francis Henn, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by Henry A. Seymour, as counsel for Alfred Miller, as follows, to wit:

Question 1. State your name, age, residence, and occupation.

Answer 1. My name is Francis Henn; I am 38 years old; I reside at No. 214 Sycamore street, in the city of Cincinnati; I am pipeman of Company No. 4, Cincinnati Fire Department.

Question 2. Are you acquainted with Alfred Miller, one of the parties to this interference, and how long have you known him?

Answer 2. Yes, I am. I have known him between twenty and twenty-five years.

Question 3. State what, if anything, you know about the invention in controversy.

Answer 3. I know nothing of the invention direct, for I was not present when it was invented. A short time after the 5th of December, 1872, after Mr. Miller's factory was burnt out, some two or three weeks, I would not be positive as to the exact time, Mr. Miller was at the engine-house one evening, and showed me what he represented to be a patent bucket-ear. He showed me something, a wire bent in the shape of Miller's Exhibit B, now before me; it might have been a little smaller. My father-in-law, Mr. Crusoe, a cooper by trade, came up, and I asked Mr. Miller if he thought the ear would work. Miller said he was so sure of it that I could not buy it for twenty thousand dollars. He said that he had Mr. Frank Milward about
167 filing a caveat for a patent. It might have been three, or maybe six, weeks after that that I met him in the Lodge of the Miami Tribe, at the corner of Sixth and Walnut streets, and he then told me that he had secured a patent for his bucket-ear. I could not state the exact time when I met him at the Lodge. When he showed it at the engine-house, he explained that the points were to be driven into the sides of the bucket, that they were self-clinching, and that it would not wear like the old-fashioned ear; that the strain would not be so great on it, and it would not pull out. He also said something about its answering for lacing belts.

And in answer to Cross-interrogatories proposed to him by P. Miles' counsel, George H. Knight, Esq., he saith:

X Question 4. Please state whether the bail-ears made by Mr. Miller or his son were of round wire, or otherwise.

X Answer 4. They were made of round-wire.

FRANCIS HENN.

Deposition of Cromwell C. Eggleston.

Cromwell C. Eggleston, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by H. A. Seymour, Esq., as counsel for Alfred Miller, as follows, to wit:

Question 1. State your name, age, residence, and occupation?

Answer 1. Cromwell C. Eggleston is my name; I am
168 sixty years old; I reside on Kline St., East Walnut Hills, Cincinnati, Ohio; I am a millwright.

Question 2. Are you acquainted with Alfred Miller, one of the parties to this interference; and if so, how long have you known him?

Answer 2. Yes, I am; I have known him between three and four years.

Question 3. Will you state what you know about the subject-matter of this interference?

Answer 3. Sometime about the first of December, 1872, I was at work for Messrs. C. H. Waters & Co., putting up machinery for them at their old factory on Pendleton street, where they were burnt out; while I was there I often heard Mr. Miller talk of his invention of a bucket-ear; it is so long ago that I do not remember whether Mr. Miller came to me and explained it to me particularly, or not; I think that Miller's Exhibit B now in my hands, is the shape of the ear; it was probably in the first half of December, 1872, as near as I can remember, when I first saw the ear.

Question 4. Did you understand that Mr. Miller was the inventor of this ear?

Answer 4. Yes, sir.

And in answer to cross-interrogatories proposed to him by George H. Knight, as counsel for P. Miles, he saith:

X Question 5. Have you seen any such ears put on to buckets?

169 X Answer 5. I have.

X Question 6. Can you state whether the original specimen spoken of by you was round, like Exhibit B, or of round wire, or otherwise; and whether the ears, as they are now manufactured, are of the same kind?

X Answer 6. I think the one I saw was a little larger than Exhibit B; it was of round wire; the ears now manufactured are of round wire. CROMWELL C. EGGLESTON.

Being unable to complete the depositions to-day, the taking thereof is adjourned until to-morrow, the 7th instant, at the same place, at 10 o'clock a. m. S. S. CARPENTER, *N. P.*

CINCINNATI, OHIO, *July 7th*, 1876, 10 o'clock a. m.

Pursuant to adjournment, now come Alfred Miller and H. A. Seymour, Esq., his attorney, and also George H. Knight, Esq., as the attorney of P. Miles; and the examination of witnesses is resumed, as follows:

Samuel Donnelly, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by Mr. Seymour, as counsel for Alfred Miller, as follows:

Question 1. State your name, age, residence, and occupation?

Answer 1. My name is Samuel Donnelly; I am forty-one years old; I reside at 557 Sycamore street, Cincinnati, Ohio;

170 I am running a wood-working machine.

Question 2. Are you acquainted with Alfred Miller, a party in this interference; if so, how long have you known him?

Answer 2. Yes, I am acquainted with him; I have known him fifteen or sixteen years.

Question 3. State what you know about the invention in controversy in this cause?

Answer 3. I was at work for Messrs. C. H. Waters & Co.; after their fire, in December, 1872, Mr. Alfred Miller brought one of those things down, (holding in his, witness' hand, Miller's Exhibit B,) and exhibited it to us men working there, and said he was going to get a patent on it.

Question 4. About how long after the fire did he show you this Exhibit B?

Answer 4. About two or three weeks.

And in answer to cross-interrogatories proposed to him by George H. Knight, as counsel for P. Miles, he saith:

X Question 5. Were such ears used by C. H. Waters & Co. in the manufacture of buckets; and if so, when did they begin their use, and in what number?

X Answer 5. I cannot answer; I went away shortly after.

X Question 6. Could such an ear as that Exhibit B be conveniently applied to a bucket?

X Answer 6. Yes, sir.

X Question 7. Please state how you would apply it?

X Answer 7. By applying it to the side of the bucket, driving it in, and clinching it on the inside.

171 X Question 8. What wood is employed in the manufacture of well-buckets?

X Answer 8. White oak.

X Question 9. Please take the Exhibit B in your hands, and state whether the prongs could be driven through an oaken stave.

X Answer 9. I have it in my hands. The prongs can be driven through an oaken stave when they are sharpened.

X Question 10. Then, in their present condition, they could not be driven, could they?

X Answer 10. No, sir.

SAMUEL DONNELLY.

Deposition of James Galliger.

James Galliger, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by H. A. Seymour, Esq., counsel for Alfred Miller, as follows, to wit:

Question 1. State your name, age, residence, and occupation.

Answer 1. My name is James Galliger; I am thirty-six years old; I reside at No. 89 Pendleton St., Cincinnati, Ohio; I am a cooper.

Question 2. State whether you are acquainted with Alfred Miller; and, if so, how long have you been so acquainted?

Answer 2. Yes, I am; I have been personally acquainted with him about sixteen years.

Question 3. State what you know, if anything, about the invention in controversy.

Answer 3. I was working for Mr. Waters before Mr.
172 Miller's fire, and also after the fire. Sometime after the fire, it may be three or four weeks, one of those ears (pointing to Miller's Exhibit B) was made at Mr. Waters' shop, and Mr. Miller brought the ear into the room where we were working at the machinery, and showed the ear to us. He said that it would make a good bucket-ear, and that he intended to have it patented, and use it.

Question 4. Did you see the bail-ear like the Exhibit B attached to a cask?

Answer 4. I saw it drove into a block of wood.

Question 5. How long after the fire was it that you saw it driven into a block of wood?

Answer 5. It was about six weeks, as near as I can remember.

And in answer to cross-interrogatories proposed to him by George H. Knight, Esq., counsel for P. Miles, he saith:

X Question 6. What kind of wood was that block?

X Answer 6. I do not remember.

X Question 7. Could this ear (Exhibit B) be driven into an ordinary well-bucket?

X Answer 7. The one that I saw could be driven into a well-bucket or any piece of oak wood. Exhibit B could not be driven into an ordinary well-bucket in that state; it could if it were sharpened.

X Question 8. Have you seen such ears used in the manufacture of well-buckets; if so, when, where, and in what number?

X Answer 8. No, sir; I left there before they commenced
173 putting up work; they were just getting out timber.

JAMES GALLIGER.

The Deposition of Charles J. Bauersfeld.

Charles J. Bauersfeld, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by H. A. Seymour, Esq., as counsel for the said Alfred Miller, as follows, to wit:

Question 1. State your name, age, residence, and occupation.

Answer 1. My name is Charles J. Bauersfeld; I am 31 years old; I reside in Covington, Kentucky; I am a plasterer by trade, but am now working at Charles H. Waters' cooper shop in Cincinnati.

Question 2. Are you acquainted with Alfred Miller, one of the parties in this case; and if so, how long have you known him?

Answer 2. I am acquainted with Alfred Miller; I have worked for him two years; I have known him four or five years.

Question 3. State what, if anything, you know about the invention in controversy in this case.

Answer 3. I have seen this bucket-ear at Waters' cooper shop in 1872; it was something similar to the ear now before me (Miller's Exhibit B), except that the points of it were sharpened. The first I saw was in copper wire. I have also seen it in iron. Alfred Miller claimed to be the inventor of it. I have seen it drove into a stave; also into a block and a fence.

174 And in answer to cross-interrogatories proposed to him by George H. Knight, Esq., as counsel for P. Miles, he saith:

X Question 4. Could Exhibit B be so driven?

X Answer 4. It could if the points were sharpened; it could not in the present state.

X Question 5. Have you seen them in use; if so, when, where, and in what number?

X Answer 5. I do not know that I have seen them in use.

X Question 6. Have you seen any buckets manufactured?

X Answer 6. I have not; that is, with copper wire. I have with iron ears. I saw them at Waters' shop, No. 60 Pendleton street, in the year 1873, say 100 dozen.

X Question 7. State whether they were of round or flat wire.

X Answer 7. They were of round iron.

X Question 8. Was the specimen first shown you of round iron?

X Answer 8. No; the first one I saw was of round copper wire.

X Question 9. Was there any other claimant to the invention than Alfred Miller?

X Answer 9. No, sir. C. J. BAUERSFELD.

The Deposition of Michael Corbett.

Michael Corbett, being duly sworn, doth depose and say, in answer to interrogatories proposed to him by H. A. Seymour, counsel for Alfred Miller, as follows, to wit:

Question 1. State your name, age, residence, and occupation.

Answer 1. My name is Michael Corbett; I am about
174 forty-one years old; I reside at 229 Broadway, Cincinnati, Ohio; I am a grocer.

Question 2. Are you acquainted with Alfred Miller; if so, how long have you known him?

Answer 2. I am; I have known him for twenty years.

Question 3. What do you know of the invention in controversy?

Answer 3. In the latter part of 1872, Mr. Alfred Miller came along on the pavement in front of my store, and showed me something similar to the "ear" I now hold in my hand (Miller's Exhibit B.) He remarked that he had something useful, in which there would be money yet; I paid but little attention to it, knowing but little about it.

Question 4. Did you understand from Mr. Miller that he was the inventor of the ear he showed you at that time?

Answer 4. Yes, sir.

And in answer to cross-interrogatories proposed to him by Geo. H. Knight, Esq., as counsel for P. Miles, he saith:

X Question 5. Are you confident that the Exhibit B was of the same form as the one he then showed you?

X Answer 5. I am not positive of it; it was something similar.

MICHAEL CORBETT.

176 *The Deposition of Andrew B. Lewis, Jr.*

Andrew B. Lewis Jr., being duly sworn, doth depose and say, in answer to interrogatories proposed to him by Henry A. Seymour, Esq., as counsel for Alfred Miller, as follows, to wit:

Question 1. State your name, age, residence, and occupation.

Answer 1. My name is Andrew B. Lewis, Jr.; I am thirty-five years old; I reside at Winton Hall, Hamilton County, Ohio; I am a merchant; I am a member of the firm of Barrett, Waters & Lewis, at Cincinnati, Ohio.

Question 2. State whether or not you are acquainted with Alfred Miller, one of the parties in this interference; and if so, how long have you known him?

Answer 2. I am; I have known him about ten or twelve years.

Question 3. State what, if anything, you know concerning the invention in controversy in this cause.

Answer 3. In the summer of the year 1872 Mr. Alfred Miller, being financially embarrassed, was very anxious for our firm to purchase the factory formerly owned by him, but at that time held by an assignee. I visited the factory several times, and at one time, on or about the first of October, 1872, Mr. Miller drew a sketch of the bail-ear in controversy on an unfinished bucket or keg. My then firm of Chas. H. Waters & Co. purchased the factory spoken of. On the 5th of December following, the factory was partially destroyed by fire. Our firm, a few days
177 after that, sent Mr. Miller to St. Louis to examine into some machinery. On his return home, on or about the 26th or 27th of December, 1872, he called at our office and showed me the model, Exhibit "B," annexed to his deposition. I told him to

try them, and on the same or next day he showed me one driven into a stave. We experimented on machinery to get them up, and did make several kinds. We made a machine that did make them. It was completed, I think, about June 1873. It made several styles to suit the different kinds of work, of both round and flat iron. We thought the invention a good thing, and about August, 1873, gave Mr. Miller money to file a *caveat*. A short time after that the necessary papers were prepared to secure a patent on this Miller invention, and, being duly signed by Mr. Miller, were forwarded to Washington to Leggett & Leggett; but on account of our firm having several applications for patents pending, and the model not being ready, the application for patent on Miller's invention (Miller's Exhibit B) was delayed for some time.

And in answer to cross-interrogatories proposed to him by George H. Knight, Esq., as counsel for P. Miles, he saith:

X Question 4. Please state why a flat form was selected to illustrate the invention in Alfred Miller's patent, whereas Exhibit B shows an ear made of round iron.

X Answer 4. Because we were more interested in well buckets, and we preferred the flat on the well bucket; and the man
178 that made them for us, being a blacksmith, could make it in that style better than round, though no special orders were given to make it flat or round.

X Question 5. Do you know of any other claimant to the invention than the parties to this interference?

X Answer 5. I do not.

X Question 6. When did your firm commence to manufacture, and in what number?

X Answer 6. I think in March, 1873, we began making, and made in the first three months thereafter probably between twenty-five and thirty-five thousand ears.

X Question 7. Please state what proportion of these were of round or other iron.

X Answer 7. As near as I can remember, they were about equally divided between round and flat.

X Question 8. Does your machinery turn out both forms?

X Answer 8. The machine we have at present turns out only flat ears.

A. B. LEWIS, JR.

STATE OF OHIO, }
County of Hamilton, City of Cincinnati. } *ss:*

At the city, county, and State aforesaid, to wit, at the office of Sam'l S. Carpenter, Esq., No. 21 West Third street, in said city, county, and State, before me, Samuel S Carpenter, a notary public in and for said county, duly authorized and acting as
179 such, personally appeared on the 6th day of July, in the

year 1876, Alfred Miller, Henry Weitler, John R. Cooling, Henry Carroll, Francis Henn, and Cromwell C. Eggleston, and on the 7th day of July, 1876, also personally appeared Samuel Donnelly, James Galliger, Charles J. Bauersfeld, Michael Corbett, and Andrew B. Lewis, Jr., the above-named witnesses, and then and there respectively made oath that the foregoing depositions, by them respectively subscribed, contain the truth, the whole truth, and nothing but the truth. The said depositions are taken at the request of the said Alfred Miller, at the time and place named in the notice hereto attached; being then and there commenced and continued by adjournment, as covenanted, to be used upon the hearing of an interference between the claims of said Alfred Miller and P. Miles, before the Commissioner of Patents, at the city of Washington, D. C.

The said P. Miles was duly notified, as appears by the original notice hereto annexed, and attended by George H. Knight, Esq., as his counsel.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 7th day of July, A. D. 1876.

[SEAL.] SAMUEL S. CARPENTER,
Notary Public in and for Hamilton County, Ohio.

Fees, $20.00, paid by Alfred Miller.
Postage, $ see envelope, S. S. C.

180 CINCINNATI, *July* 8th, 1876.

I hereby certify that the within depositions of Alfred Miller, Henry Weitler, John R. Cooling, Henry Carroll, Francis Henn, Cromwell C. Eggleston, Samuel Donnelly, James Galliger, Charles J. Bauersfeld, Michael Corbett, and Andrew B. Lewis, Jr., relating to the matter of interference between Alfred Miller and P. Miles, was taken on the 6th and 7th days of July, 1876, and sealed up and addressed to the Commissioner of Patents by me, this 8th day of July, 1876.

SAML. S. CARPENTER,
Notary Public in and for Hamilton County, Ohio.

To R. H. DUELL,
Commissioner of Patents, Washington, D. C.

[Revenue stamps and three seals.]

181 EXHIBIT APPLICATION COLLINS. P. W.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files of this office of the file-wrapper, contents, and drawings in the

matter of the application of William Collins, filed February 29th, 1868, for pail and tub-ear.

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United Sttaes the one hundred and third.

[SEAL] W. H. DOOLITTLE,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the files of this office of the file-wrapper, contents, and drawing in the matter of the application of William Collins, filed February 29th, 1868.

In testimony whereof, I, R. H. Duell, Commissioner of Patents, have caused the seal of the Patent Office to be here-
182 unto affixed, this eleventh day of September, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and first.

[SEAL.] R. H. DUELL,
Commissioner.

Petition.

To the Commissioner of Patents:

Your petitioner prays that a patent may be granted to him for the invention set forth in the annexed specification.

WILLIAM COLLINS.

To all whom it may concern:

Be it known that I, William Collins, of Marlborough, in the county of Cheshire, in the State of New Hampshire, have invented a new and improved pail and tub-ear, and I do hereby declare that the following is a full and exact description thereof, reference being had to the accompanying drawings and to the letters of reference marked thereon.

The nature of my invention consists of making my pail and tub-ears of wire, bent in such shape as will allow the ear to be immediately connected with the pail or tub by the means of the two ends of the ear being put through the stave of the pail or tub, and clinched or headed on the outside or inside of the same, as the case may require.

183 Fig. 1 represents the shape of the pail or tub-ear before being connected with the pail or tub.

Fig. 2 represents the ear attached to the pail or tub, A being the stave of the pail or tub, B B are the two ends put through the stave and clinched, C is the eye of the ear, D is the bail hooked into the eye C.

What I claim as my invention is, the wire pail and tub ear either headed or clinched.

Witnesses: GEO. F. BUSS, CHARLES BUSS. WILLIAM COLLINS.

TOWN OF MARLBOROUGH, *County of Cheshire, State of New Hampshire.* } *ss:*

On this, the 26th day of February, 1868, before me, the subscriber, a justice of the peace, personally appeared the within named William Collins, and made solemn oath (or affirmation) that he verily believes himself to be the original and first inventor of the pail and tub-ear herein described, and that he does not know or believe the same was ever before known or used; and that he is a citizen of the United States.

NELSON CONVERSE,
Justice of the Peace.

184 MARLBORO', N. H., *June* 13, 1868.

To the Commissioner of Patents:

DEAR SIR: Has there been anything done about the patent of Wm. Collins, improved pail-ear? I sent the model some time ago, but have not heard whether it has been taken up or not. Please inform me about it.

Yours, truly, WM. COLLINS.

U. S. PATENT OFFICE,
WASHINGTON, D. C., *June* 28, 1868.

WILLIAM COLLINS, Marlborough, N. H.

SIR: Please find below the decision of the examiner in charge in the matter of your application for patent for pail and tub ear, filed April 24, 1868.

Very respectfully, ——— ———, *Commissioner.*

EXAMINER'S ROOM No. 9.

The application above referred to has been examined, and found to have been substantially anticipated by patent to J. Walton, May 12, 1868, and must therefore be rejected.

EDWARD BEBB, *Examiner.*

W. Collins.

Tub Ears

Filed Feb 29 1869.

No. 323
Double Pointed
Tack Co.
&
Two Rivers
Manuf'g Co.
et al.

page 186.

Fig: 2.

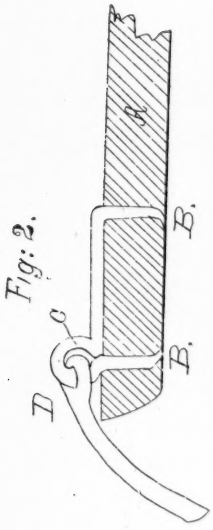
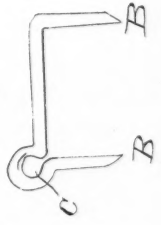


Fig: 1.



Witnesses.
George F Burr
Charles Burr

Inventor.
William Collins.

186

185 No. 1868 $\frac{42}{808}$

William Collins, of Marlborough, county of Cheshire, State of New Hampshire.

Pail and Tub-Ear.

Rec'd,	Feb. 29, 1868.
Petition,	" "
Affidavit,	" "
Specification,	" "
1 Drawing,	" "
1 Model,	April 24, "
Cert. Dep.,	
1 Cash $15.00,	Feb'y 29, 1868.
Add'l fee cert.,	
" " cash,	
Examined,	
2 Issue,	
3 Patented,	186
Recorded vol.,	page
Circular,	
Rejected June 28, 1868.	

Received in Draughtsman's Room, June 18, 1868.

186 (Here follows diagram marked page 186.)

187 EXHIBIT DECISION OF EXAMINER OF INTERFERENCE. P. W.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the records of this office of the decision of the Examiner of Interference in the matter of the interference Miller *vs.* Miles, for bail-ears for buckets.

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and third.

[SEAL] W. H. DOOLITTLE,
Acting Commissioner.

In the United States Patent Office.

In re INTERFERENCE A. MILLER *vs.* P. MILES.—BAIL-EARS FOR BUCKETS.

Before the Examiner of Interference.

This is an interference between the application of Alfred

Miller, filed February 28, 1876, for reissue of patent No. 149,594, April 14, 1874, and the patent of Purches Miles No. 147,343, February 10, 1874, application filed November 11, 1873. The issue is set forth in Miller's first claim, as follows:

"A bail-ear having two lateral prongs, and formed of a
188 single piece of metal, the upper prong and the body of the ear being directly connected by a single loop," &c.

The testimony shows that Miller made the invention as early as December 25, 1872, when the model (Exhibit B) was made. This is corroborated by numerous witnesses. Miller filed a caveat in August, 1873, showing the invention, and filed an application for patent December 27, 1873. The bail-ears were manufactured extensively from and after about March, 1873. (Lewis' Test., p. 19.)

Miles conceived the invention in March, 1873, (p. 23, f. 90,) made a few ears by hand between March and October, 1873, (p. 24, f. 96,) and put them upon the market in October, 1873, (p. 25, f. 98.) November 11, 1873, he filed his application for a patent, which was granted February 10, 1874.

Miles has taken the testimony of one Walton, a patentee of a bail-ear (patent No. 77,853, May 12, 1868, reissued July 11, 1876, No. 7,222) relative to experiments of his own prior to obtaining a patent, with a view to show such a public use as would defeat Miller's application. Testimony of one Collins is also taken with the same view, Collins being a rejected applicant before the Patent Office. It is clear that this testimony cannot be considered. The patent of Walton was before the Primary Examiner, who found no anticipating matter therein. The rejected application of Collins was also before him, and was incapable of
189 being lawfully adduced as a reference. The Examiner of Interference has no jurisdiction over the question of novelty, under the law. He is required by the provisions of rule 59, when, during the continuance of an interference, "it shall appear" that a party is not entitled to a patent by reason of abandonment, public use, or other statutory bar, to report the facts to the Commissioner, in order that they may be brought before the proper tribunal for determination. But in a case like the present, where the Primary Examiner himself, who is the proper tribunal for the determination of these questions, could not legally consider evidence of the kind offered, if brought before him, there is no occasion for applying the rule in question. The alleged statutory bar is not such as "appears" necessarily, or grows out of the consideration of the case. The Commissioner's decision in case of Smith *vs.* Perry *et al.* O. G., Vol. 9, p. 688, completely governs action as to to this point.

I do not find any fraudulent matter in Miller's claim, as suggested by counsel for Miles; it certainly is a broad claim, which

would render Miles tributary under it, if patented and sustained by the courts, but as the Primary Examiner has allowed it, there is no tribunal to sit in revision of his action short of the courts of the United States.

The question of priority is the only one remaining to be disposed of, which I find on the evidence to be in favor of Alfred Miller, and decide accordingly.

October 4, 1876. H. H. BATES,
Ex. of Interferences.

190 EXHIBIT DECISION EXAMINER-IN-CHIEF. P. W.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE.

To all persons to whom these presents shall come, greeting:

This is to certify that the annexed is a true copy from the record of this office, of the decison of the Examiner-in-Chief, in the matter of the interference Miller *vs.* Miles, for improvement in bail-ears for buckets.

In testimony whereof, I, W. H. Doolittle, Acting Commissioner of Patents, have caused the seal of the Patent Office to be hereunto affixed, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the one hundred and third.

[SEAL.] W. H. DOOLITTLE,
Acting Commissioner.

No. 3860. U. S. PATENT OFFICE, *Dec.* 6, 1876.

Before the Examiner-in-Chief, on appeal.

In the matter of interference between the application of Alfred Miller for re-issue of patent No. 149,594, dated April 14, 1874, and the patent of Purches Miles, No. 147,343, dated February 10, 1874, improvement in bail-ears, tubs, &c.

Both parties to this contest have patents with limited claims for bail-ears for buckets, &c., and the controversy arises
191 from Miller's re-issue application with the followingel aim:

1st. A bail-ear having two lateral prongs, and formed of a single piece of metal, the upper prong and the body of the ear being directly connected by a single loop, all constructed substantially as and for the purposes set forth."

On the part of Miller, it appears that he had a drawing of the invention made, and explained it to Lewis, as early as October 1, 1872, which may be taken as the proven date of his conception of the invention; had a rude model, Exhibit B, made and showed it to Lewis as early as December 27, 1872, which may be taken as the proven date of his reduction of the invention to rude

practical form; filed a caveat in August, 1873, and an application for a patent December 27, 1873, and obtained a patent April 14, 1874, with a limited claim.

On the part of Miles, it appears that he had a rude model made and explained it to Wright and others as early as March, 1873, which may be taken as the proven date of his conception of the invention, and also of his reduction to rude practical form; had an application for a patent filed November 11, 1873, and received a patent February 10, 1874, with a limited claim.

From this state of facts, Miller was the first, by about five months, to conceive of the invention, and the first, by about four months, to reduce it to rude practical form. Miles was the first, by about a month, to apply for a patent, and the first, by
192 about a month, to obtain a patent.

Miller being the first to conceive of and illustrate the invention to another, and having evidently proceeded with reasonble diligence, and independently of Miles, must be regarded as the meritorious inventor, as between the contestants, of what is common to both their patents, and could have been the subject of a claim in his original application.

Evidence is in the case alleged by Miles as proving that the invention in dispute, as broadly claimed in Miller's reissue claim, had been known and publicly used more than two years before either party applied for a patent. This evidence is earnestly urged by Miles to defeat a broad claim to which he makes no claim, and is as earnestly protested against by Miller, who seeks such a claim as outside of the scope of an interference proceeding. Such a public use of an invention, if established beyond doubt, is a statutory bar to the grant of a patent, and depositions properly taken by contestants, clearly proving such use, though not fatal to a determination of priority of invention, in an interference proceeding, may warrant the Commissioner, after the conclusion of the interference proceeding, in directing the principal examiner to reject the successful applicant upon that ground, from which action of the examiner an *ex parte* appeal may be taken as in cases of rejection upon references. It is, therefore, unnecessary for us to consider this question further.

193 As to priority of invention, the decision of the Examiner of Interferences rendering judgment in favor of Miller is affirmed.

T. C. WOODWARD,
V. D. STOCKBRIDGE,
Examiners-in-Chief.

In this case there is evidence tending to show that the device in controversy was old before either of the contestants pretend to have invented. This, if properly in the case, goes to show that neither of them was an original inventor. As there is some

doubt whether we should consider this evidence and dissolve the interference, we concur in the above decision, but suggest that the office is put on notice that the thing claimed was old and common, and that the subject is proper to be considered by the Commissioner and Primary Examiner on the question of whether patent should issue to either on the present claims.

R. S. B. CLARK,
V. D. STOCKBRIDGE,
Examiners-in-Chief.

194 United States Circuit Court, Eastern District of Wisconsin.

DOUBLE-POINTED TACK COMPANY, Complainant,
vs.
TWO RIVERS MANUFACTURING COMPANY, JOSEPH MANN and HENRY MANN, Defendants. } In Equity.

I, Phil. Wiborg, a notary public in and for the State of Wisconsin, duly commissioned to act as such in the State aforesaid, do hereby certify that, in pursuance of the mutual agreement of counsel hereto, the foregoing depositions of John Esch, Edward E. Owens, Wm. Willer, Joseph Money, Joseph Fisher, and Henry Mann, were taken before me on the part of the defendants herein, and that the same contains all the testimony given and the exhibits introduced at the time of taking the same.

I further certify that at the time and place of taking such testimony I was attended by counsel for the respective parties and the witnesses, in person, and that each and all of said witnesses were duly sworn to testify the whole truth and nothing but the truth, and that thereafter the said depositions were respectively read over and signed by them.

I further certify that I am not of counsel or attorney for either of the parties hereto, nor interested in the event of the cause.

In testimony whereof, I have hereunto set my hand and official seal, this 8th day of September, 1879.

[NOTARIAL SEAL.] PHIL. WIBORG,
Notary Public, Milwaukee County, Wisconsin.

195 Circuit Court of the United States, Eastern District of Wisconsin.

THE DOUBLE-POINTED TACK CO.
vs.
HENRY MANN, JOSEPH MANN and THE TWO RIVERS MANUFACTURING CO. } In Equity.

Testimony *de bene esse*, taken in behalf of the complainant in rebuttal, before T. B. Mosher, notary public, pursuant to notice and stipulation hereto attached.

NEW YORK, *August* 28, 1879, 10 *a. m.*

Present: A. v. Briesen, Esq., counsel for complainant.

Lemuel W. Serrell, a witness called on behalf of the complainant, being duly sworn, deposes and says:

I am about 50 years old; reside at Plainfield, New Jersey, and am a solicitor of patents, doing business at 120 Nassau street, New York; I have been a patent agent in business for over thirty years, and have been frequently called as an expert relating to patent causes. I have examined the letters patent No. 147,343, granted February 10, 1874, to Purches Miles for improvements in bail-ears; I procured the said letters patent for said Miles, and I fully understand the same. I am well acquainted with
196 the state of the art in relation to bail-ears, and that knowledge has been derived not only from communications with the inventor, but from extensive examinations which were connected with interference proceedings in the Patent Office. In the said letters patent of complainant the second paragraph makes a very broad admission to the effect that wire staples have been used for fastening the eyes of bails to pails, and that these staples have been driven into the wood with the penetrating points nearly at right angles to the surface. I am also aware, and was aware before preparing the papers for said patent, that the penetrating points of staples had been formed in a variety of manners, among which I name the cutting of the wire diagonally, the diagonal cut generally being on the flat side of the staple.

The said invention of Miles, as I understand it, therefore, does not relate broadly to all kinds of staples, nor to the simple cutting of a penetrating point diagonally, but the invention of the said Miles is clearly set forth in the patent, in the third paragraph thereof, and in the two claims, and from these I understand that Mr. Miles is the inventor—

First. Of a new article consisting of a staple fastening for bails, made of wire, with *both* points cut diagonally on the *under*
197 *side*, so as to bend upwardly in the act of driving into the wood, thereby preventing the weight of the pail withdrawing the staple, so as to make better and more reliable articles than the staples that have before been made use of.

In the staples before made use of, there was no tendency for the ends to bend upwardly in the act of driving. Hence, unless they passed entirely through the wood and the point turned over, they would easily pull out. By the improvement of Mr. Miles, the diagonally cut ends of the staples are bent upwardly, and clinched or anchored firmly into the wood by the simple act of driving; and hence, are to that extent clinched, whether they pass through the wood or not.

Second. The improvement of the said Miles consisted in com-

bining with the peculiar fastening staples before stated, a metallic washer of a convex shape, which served to prevent the end of the bail from coming into contact with the surface of the pail and marring the same.

I don't know of any instance where a washer has been combined with a staple and bail for a pail; but the second claim of the said re-issued patent appears to be limited to the convex washer in combination with the bail-fastening staple, having upwardly penetrating points.

198 At the request of complainant's counsel, I have examined defendants' Ex. Mann, defendants' Ex. Mann Brothers, and the bail-fastening now produced by counsel for complainant and offered in evidence, marked complainant's Ex. F, T. B. M., Notary Public, and have compared the same with the said patent of Purches Miles for the purpose of ascertaining whether or not said staples, shown in the several exhibits mentioned, are described and illustrated substantially in said letters patent. Upon comparison of defendants' Ex. Mann Brothers with the claim and specification of complainant's said patent, I find that it corresponds in every particular with the said letters patent. The staple-fastening has two penetrating points; the points are cut diagonally, so as to turn upwardly in the driving, the diagonal faces being both on the lower side of the wire and substantially parallel to each other. There is also a portion corresponding with that which is spoken of in the patent as the loop 4 and the body 5, and when the staple-fastening is driven into the wood the ends will bend upwardly, as set forth in the said letters patent, and I consider the same an infringement upon the first claim of the said letters patent. In regard

199 to the staple, defendant's Exhibit Mann, the points are cut diagonally and substantially parallel with each other, so that when said staple is driven into the wood the points will turn in the same direction. I consider that the said staple, being capable of being driven into the pail so that both points will turn upwardly, as described in the specification of the said complainant's patent, will infringe the first claim of the said patent substantially. It is true that the loop 4 and body 5 spoken of in the said first claim are not of the same shape as those represented in the drawing; but this difference I consider immaterial, with reference to the object sought to be obtained in this patent, and this view is confirmed by the fact that in the second claim the body 5 of the staple is not spoken of, the staple spoken of in the second claim not being limited to the particular body 5. This view refers equally well to the staple, defendants' Ex Mann; but by adding to the staple defendants' Ex. Mann, a washer, as shown on complainant's Ex. F, then the staple is employed in a manner to be useful for the purpose of complainant's patent, and

corresponds exactly with the devices covered by the second claim of the said complainant's patent. In this complainant's Ex. F the washer is convex, and corresponds with the washer
200 described and shown in the said patent, both in construction and in effect.

At the request of complainant's counsel I have examined the staple marked defendants' Ex. "Money" and defendants' exhibit marked "More Money," and I do not consider that the same correspond with the staple called for in the patent of complainant; and, in fact, staples of this character are expressly disclaimed in the said patent. My opinion is that they are practically valueless for the purpose of attaching bail-ears, because the ends of the staple, in driving, are liable to turn in such a manner as either to split the wood or else to bring the points of the staple together so as to grasp only a small portion of the wood and render it liable to pull out that small portion of the wood.

I have also examined defendants' Ex. A, and the same is not in any manner adapted to a fastening for bail-ears; neither does it contain the features called for by the said letters patent, for the reason that the penetrating points of the hold-back fastening, Ex. A, are made wedge-shaped, and the wedge being on the flat sides of the staple, and equally on both sides, tends to split the wood, as appears by the exhibit itself, and there is no tendency
201 to bend the points of this hold-back fastening in the act of driving. Upon reference to defendants' Ex. C, I find that the hold-back fastening is made with penetrating points tapering on all four sides similar to a wrought nail, the intention being that the said points shall drive into the wood straight, and passing through the wood composing the tongue of the wagon the point is to be afterwards clinched; the points in this Ex. C are not of the character called for by the letters patent of complainant, because in the Ex. C the points are pyramidal, while in the letters patent the points are formed by the diagonal cut upon a cylindrical wire having in view the object, which is set forth in the claim, that the points will bend upwardly as they are driven into the wood.

Upon reference to defendants' Ex. B, I find that the staples thereon to which the hooks of the traces or tugs are connected, have been formed of cylindrical wire, and that the hames have been bored with holes through which the ends of the staples pass, and that washers have been applied around the ends of these staples, and said ends riveted. There is nothing in this Ex. B corresponding with the devices set forth and claimed in
202 complainant's patent; because the points have not been cut diagonally, neither have they been driven into the wood so as to clinch in the act of driving.

In the year 1876 there was an interference in the Patent Office

between the patent of complainant No. 147,343 and Albert Miller. That is to say, Albert Miller applied for a re-issue of his patent No. 149,594, and in that application for re-issue Miller bought a claim for a bail-ear having two lateral prongs and formed of the same piece of metal, the upper prong and the body of the ear being directly connected by a single loop, similar in fact to defendants' Ex. A. In consequence of making this broad claim the Patent Office put him into interference with the patent of complainant, simply because that claim of Miller was broad enough to apply to the device shown by Miles. That interference was proceeded with and I acted in behalf of Mr. Miles and it resulted in the re-issue to Miller of the re-issue No. 7483, January 30, 1877. No claim was made during those proceedings by Miller or any other party to the compound staple fastening, with the diagonally cut penetrating points, as set forth in the patent of complainant, and such points are not shown either by Miller or any other person having a patent on bail-ears as far as I know. Miller, on the contrary, had a round wire with the ends split so that it would clinch in both directions after passing in straight through a hole drilled on purpose to receive it. This device of Miller I do not consider adapted to ordinary bails, because it cannot be used except after the holes have been drilled to receive the ends of the fastenings, the same as they have to be drilled in defendants' Ex. B. I have here present a copy of the said Miller re-issue, to which I would refer.

205

(The same is offered in evidence by counsel for complainant, and marked Ex. Re-issue Miller.)

During the year 1876 John C. Kirchbaum obtained a re-issue (No. 7183) of his patent originally granted in 1869, in which a claim was made to a bail-ear consisting of a single strip of material, the ends of which are bent at an angle to the body of the ear and form two prongs, located the one above the other, the upper portion of the ear formed into a loop for the attachment of the bail. This claim is evidently intended to be broad enough to apply to such devices as defendants' Exs. A and B.

In this patent of Kirchbaum's the penetrating points are conical, and not cut diagonally on the under side only, as called for in the Miles patent of complainant, and are therefore not adapted to bend upwardly.

204

During the year 1877 an interference was instituted in the Patent Office between the application of William Collins and the said re-issued patent of the said Kirchbaum. During the proceedings that arose under that interference, in which I appeared for Collins, the only question that was considered related to the first claim of said Kirchbaum's reissue, which I have before quoted. There was no claim set up by Collins or by Kirch-

baum for a peculiar staple fastening, with the diagonally cut penetrating points, to which the patent of Miles relates, and the patent of the said Miles was not brought into question in this interference between Collins and Kirchbaum.

As to the construction of the Kirchbaum devices, the remarks made by me with reference to defendants' Ex. C will apply to show why, in my opinion, the Kirchbaum device is essentially different from the device described in complainant's patent.

LEMUEL W. SERRELL.

Subscribed and affirmed to before me this 28th day of August, 1879.

[SEAL.] T. B. MOSHER, *Notary Public.*

(No one appearing in behalf of the defendants, this deposition is closed.)

205 *Deposition of Purches Miles in rebuttal.*

Counsel for complainant calls Mr. Purches Miles who has already appeared as a witness in this cause. Said Purches Miles testified *de bene esse*, as follows:

Q. 1. The defendants in this cause admit making and selling staples like defendants' Ex. Mann; have you any knowledge of the fact that they sold these staples without washers, as shown in defendants' Ex. Mann, or do they, as far as you are aware, sell them with the washers, as shown in complainant's Ex. F?

A. They sold them with washers.

Q. 2. When did they first make staples like defendants' Ex. Mann; I mean in contradistinction to the staples like defendants' Ex. Mann Brothers?

A. After the motion for injunction was argued in this cause; I know this, because I have seen their goods in the market since that time, stamped with their name; and I also know that staples like Ex. Mann are hardly ever used on pails without washers, as shown on Ex. F.

Q. 3. As a matter of fact, would they be saleable to any extent without washers?

A. They would not, especially for painted ware; because without the washer the paint would be very much marred by the motion of the bail.

206 Q. 4. Did you ever show this invention to the defendants?

A. Yes, sir.

Q. 5. When?

A. In the summer of 1873; that was within a few months after I made the invention.

Q. 6. Did you then explain to them the advantage of the diagonal cut on the points being parallel?

A. Yes, sir.

Q. 7. And what did they say?

A. They thought it was an excellent thing and wished to buy the right, if I obtained the patent for the States of Wisconsin and Illinois, and especially of Wisconsin; I took pains to explain that point-feature to them, and did so very particularly.

Q. 8. Whom did you see at the interview in the summer of 1873?

A. Mr. Henry Mann and his brother; also the foreman of the factory at the Two Rivers, Wisconsin.

PURCHES MILES.

Subscribed and sworn to before me, this 28th day of August, 1879.

[SEAL.] T. B. MOSHER, *Notary Public.*

UNITED STATES OF AMERICA, *Southern District of New York.* } *ss:*

207 I, T. B. Mosher, a notary public, duly commissioned and sworn under the laws of the State of New York, do hereby certify that the foregoing deposition of Lemuel W. Serrell was taken, subscribed, and affirmed to before me this 28th day of August, 1879, pursuant to notice given on the 18th day of July, 1879, *de bene esse*, and that counsel for complaint was present. I also certify that the reason for taking the foregoing deposition is that said witness lives more than one hundred miles distant from Milwaukee, Wisconsin, the place of trial.

I also certify that the deposition of Purches Miles was also taken, subscribed, and sworn to before me on the day and date thereof, and for the same above-mentioned reason.

And I do further certify that I am not of counsel or attorney for either of the parties in the said suit named, nor in any way interested in the event of said cause.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 28th day of August, 1879.

[SEAL] T. B. MOSHER,
Notary Public, New York County.

208 EXHIBIT "REISSUE MILLER." T. B. M., NOTARY PUBLIC.

UNITED STATES PATENT OFFICE.

Alfred Miller, of Cincinnati, Ohio, Assignor to Chas. H. Waters & Co.

Improvement in Bails and Ears for Buckets.

Specifications forming part of Letters Patent No. 149,594, dated April, 14, 1874; reissue No. 7,483, dated January 30, 1877; application filed February 28, 1876.

To all whom it may concern:

Be it known that I, Alfred Miller, of Cincinnati, in the county of Hamilton and State of Ohio, have invented certain new and useful improvements in Bails and Ears for Buckets; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it pertains to make and use it, reference being had to the accompanying drawings which form part of this specification.

My invention relates to improvements in bucket bails and ears.

In the drawings, Figure 1 represents a side elevation of the invention complete; Fig. 2, a detached view of an ear.

The bail A, constructed preferably of metal, has a loop, *b*, formed at each end of the same, and the bail is also provided at its centre with a swivel-loop, C, for the attachment of a cord or chain.

Heretofore the bail has been flattened at its central portion for the attachment of a swivel-loop; but such construction materially weakens the bail at a point where it is subjected to the greatest wear and strain.

To remedy the defects above noted the bail A is re-enforced at its centre by welding a separate rod, *a*, thereto, which is thereafter flattened by a punch, or in any other suitable way, and then punched for the reception and attachment of the shank of the swivel-loop C. The ears B B are each constructed of one piece of metal, the upper end of the same being bent backward and then forward to form a loop, *b'*, while the extreme end of the ear projects beyond the body of the same, and at about right angles thereto, to form a prong, *d*, which serves to secure the upper end of the ear to the bucket or other receptacle. The central portion D of the ear is preferably made flat, that it may closely fit the sides of the bucket or cask. The lower portion of the ear is also bent inwardly to form a prong, *d*. The said upper and lower prongs are driven into the cask, bucket, or keg.

The ends of the prongs *d* may be notched, as shown at *c*, in order that the inner end of the prong may be clinched against

A. MILLER.

Assignor to C. H WATERS & CO.

BAILS AND EARS FOR BUCKETS.

No. 7,483. Reissued Jan. 30, 1877.

Fig. 1.

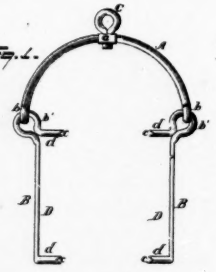


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Fig. 2.

WITNESSES

C. E. Stillingham Jr.

Albert H. Bright

INVENTOR

Alfred Miller.

By Leggett & Leggett.

Attorney

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the inner surface of the bucket, after the prongs are driven into the same.

The ears are attached to the opposite sides of a bucket, keg, or cask by driving the prongs *d* through the bucket, the upper prong being driven in through the rim, and the lower one a short distance down the side of the bucket or cask.

To insure against possible detachment of the ears from the bucket or cask, the projecting ends of the ear may be clinched or swaged against the interior surface of the receptacle.

Having fully described my invention, what I claim, and desire to secure by Letters Patent, is—

1. A bail-ear having two lateral prongs, and formed of a single piece of metal, the upper prong and the body of the ear being directly connected by a single loop, constructed substantially as and for the purpose set forth.

2. As an article of manufacture, the combined bucket bail and ear herein described, the latter constructed of flat iron, with its lower end rounded to pass through the side of the bucket, and the other end rounded and bent upon itself to form a loop, and terminating in a prong constructed to pass through the side of the bucket, substantially as described.

3. The bail A, re-enforced at its central portion for the attachment of a swivel-loop, substantially as and for the purpose specified.

4. The combination, with the bail A, re-enforced at *a*, of the swivel-loop C, substantially as and for the purpose set forth.

ALFRED MILLER.

Witnesses:
THOS. B. HALL.
E. J. NOTTINGHAM.

209 (Here follows diagram marked page 209.)

210 United States Circuit Court, Eastern District of Wisconsin.

THE DOUBLE-POINTED TACK COMPANY,
vs.
THE TWO RIVERS MANUFACTURING COMPANY, JOSEPH MANN AND HENRY MANN, } In Equity.

Testimony of Henry Mann, taken on part of defendants *in rebuttal* to testimony of Purches Miles, before Phil Wiborg, notary public, pursuant to agreement of counsel.

OCTOBER 17TH, 1879, 10 A. M.

Complainant appeared by N. S. Murphy, defendants by Wm. P. Lynde.

Deposition of Henry Mann in Rebuttal.

Henry Mann, being recalled as a witness on behalf of the defence, testified as follows:

Q. Mr. Mann, Purches Miles was asked the question, by complainant's counsel: Have you any knowledge of the fact that they (the defendants) sold these staples without washers as shown in defendants' Exhibit Mann, or do they, as far as you are aware, sell them with washers, as shown in complainant's Exhibit F? And he has answered: They sold them with washers. Now, what is the fact in regard to that?

(Objected to by complainant as immaterial.)

A. We sell them with and without washers.

Q. How large a proportion of your sales are with washers?

(Objected to as incompetent and immaterial by complainant.)

211 A. As near as I can remember, we have sold about half-and-half: about one half without washers, and one half with washers. I have the number of pounds we have sold without washers in my hand here.

Q. You may give that.

A. I have here seven thousand four hundred and thirty-eight pounds.

Q. Can you tell from your books the number of pounds that you have sold with washers?

A. Yes, sir; I can.

Q. I wish, Mr. Mann, you would figure that up, and hand the number of pounds to the commissioner to insert in answer to the question: How many pounds have you sold with washers?

Mr. Mann states that he has examined his books, and finds that they have sold five thousand six hundred and thirty-five pounds with washers.

Q. Complainant's counsel asked Mr. Miles: When did they (defendants' meaning) first make staples like defendants' Exhibit Mann, I mean, in contradistinction to staples like defendants' Exhibit Mann Bros.? Mr. Miles answers: After the motion for injunction was argued in this cause. I know this because I have seen their goods in the market since that time, stamped with their name; and I also know that staples like Exhibit Mann, are hardly ever used on pails without washers, as shown on
212 Exhibit F. How is the fact in regard to this Mr. Mann?

A. Mr. Miles is either mistaken or he don't tell the truth, because we commenced to make these staples in October.

Q. by complainant's counsel: What year?

A. 1878.

Q. Then you commenced to make them before the bill was filed in this cause?

A. Yes, sir.

Q. Mr. Mann, you commenced manufacturing these staples, like Exhibit Mann, a month or so before the injunction was argued, did you?

A. Yes, sir; we commenced to use them. We commenced to manufacture them, may be four, five or six months before that time. I don't know when we commenced on the machinery. We had to make a machine and dies, and we did that kind of work between hours. We made preparations long before we made them, but we commenced to use them in October. All the preparations were ready in October.

Q. Mr. Miles further says: I also know the staples like Exhibit Mann are hardly ever used on pails without washers, as shown on Exhibit F.

A. I will go with Mr. Miles into every town, city, and village in the United States, and show him pails without washers.

Q. These bail-ears are used without washers?

213 A. Yes, sir; his own staples and ours. I will show him his own and ours without and with washers in every town and village and city in the United States, and I know whereof I speak.

Q. Are there as many of these staples used without washers as with.

A. Well, that I am unable to say.

Q. The complainant's counsel asked Mr. Miles as follows: As a matter of fact, would they be saleable to any extent without the washer? Mr. Miles answers: They would not, especially for painted ware, because without the washer the paint would be very much marred by the motion of the bail. How is the fact in regard to that?

A. I have no doubt that Mr. Miles, or whoever sells these complainant's staples, sell a large proportion without washers.

Q. Without washers?

A. Yes, sir.

Q. That you don't know about—tell us what you do know.

A. There are a good many used without washers.

Q. So they are saleable without washers?

A. They are saleable without washers, because if they were not we could not sell them.

Q. How is it about painted ware? He says: They would not, especially for painted ware, because without the washer

214 the paint would be very much marred by the motion of the bail; how is that?

A. The painted ware is a little more of a fancy article than the unpainted, and manufacturers will spend a little more money—a trifle more—for the looks, for the fancy of the thing. These washers are put on because it makes the pail look a little better, not for its utility. The utility cannot count for anything. As the bail on a painted pail works, the pressure comes outward away from the wood.

Q. The curve in the bail springs—

A. Springs outward away from the pail. You take a piece of wire and turn this bail on a pail and it will always bend just a little larger than the pail; then, once put on a pail, the spring is away from the pail, so it will not protect the pail—it don't need any protection so far as that is concerned. It don't rub. It is of no account. It don't injure the pail if the washer was not on.

Q. Does it mar the pail when the washer is not on?

A. It does not to any extent. We have not had any trouble. We have made a good many pails without any washer. We have never in one instance had our attention called to it by any of our customers. We have sold pails without any washers, and
215 never in one instance have they ever called our attention to it. It don't injure the pail whether the bail for the pail is used without the washer.

Q. Mr. Miles, in his deposition, speaks of a conversation which he had with you in the summer of 1873, in which he says that he especially pointed out to you the advantage of the diagonal cut; do you recollect that conversation?

A. I recollect Mr. Miles being in our office and having a conversation. I can't tell exactly what the conversation amounted to.

Q. Did you afterwards find that that diagonal cut was in common use?

(Objected to as leading and incompetent.)

A. I did.

Q. Have you in your possession, and will you produce to the commissioner, a staple with these diagonal cuts that has been in use for a number of years; and, if so, state where you got that staple.

(Complainant's counsel objects to this question as incompetent, irrelevant, and immaterial and leading, and because it is not rebutting to the testimony of Mr. Miles.)

A. I have such a staple, which I hold in my hand, and produce it to the Commissioner.

216 (Defendants' counsel offers the staple produced by witness in evidence, and it is marked Defendants' Exhibit "Gas House," P. W.)

To which offer the complainant's counsel objects upon the ground last above stated.

A. I took this staple out of one of the old dilapidated blinds at the gas house.

Q. Ventilating blinds?

A. Ventilating blinds; yes, sir; this staple has been in that blind at least twelve years.

Q. He says, at that conversation, that they (meaning you) wished to buy the right, if he obtained the patent, for the States of Wisconsin and Illinois, and especially Wisconsin; how is that?

A. I don't remember if I tried to buy the right for the State of Illinois, but I have talked with him the same as I would with an insurance man, or with any other patent-right man; we have bought patents and lost money; we have bought patents, and the patents proved to be a fraud within the last two years; the papers were made right here in this house.

Q. If you had wished to buy the patent, was there any objection made on the part of Mr. Miles to sell the patent to you?

A. He said that he would inquire or find out and let us know, and he never let us know, and we never wished to buy it; I made no offer; I want that to be understood; I made no
217 offer for the patent; I did not offer a cent; I talked at random.

Q. Your inquiry was then to ascertain when patented it would be subject to sale?

A. Yes, sir.

Cross-examined by complainant's counsel:

Q. In enumerating the number of pounds of staples you have sold without washers, seven thousand and odd pounds, state during what period of time you sold that quantity of staples?

A. We sold that quantity from some time in October or November of last year, 1878, up to the present time.

Q. Without washers?

A. Without washers; yes, sir.

Q. Now have you examined your books to ascertain how many pounds of staples without washers you sold prior to October, 1878?

A. We have not sold any before that time.

Q. Without washers?

A. In any way.

Q. With or without?

A. With or without.

Q. Then you mean to say that you commenced to manufacture this staple for pails in October, 1878?

A. Yes, sir.

Q. Now, you think since that time that you have sold
218 about an equal number, though you are not certain, without washers and an equal number with washers?

A. Yes, sir, about.

Q. Now, as it respects the sales with and without washers state whether there is any demand of the trade which regulates the quantity you sell with and the quantity you sell without washers, or how; and why is it that you do not sell them all of one kind—what controls you in that respect?

A. The orders from our customers control it.

Q. Then it is the demand of the trade do I understand you?

A. The demand of the trade, yes, sir. They order five hundred pounds of staples without washers or they say five hundred pounds of staples and washers to match. We know about how many washers it takes to a given number of pounds.

Q. And unless they call for washers when they order staples you don't furnish them?

A. We don't furnish them.

Q. You sell these staples to manufacturers to be used in manufacturing pails?

A. Yes, sir.

Q. You don't know, do you, whether in all cases of orders for staples without washers that they are used by the manufacturers without washers; how is it—do you know about that?

218 A. I know they are used without washers.

Q. In every case?

A. That I cannot tell. I know they are used largely without washers.

Q. When you speak of seven thousand and odd pounds you have sold, state whether those have all been sold to be used by other manufacturers in constructing pails or does that include what you have used yourself to put into pails;

A. No sir, that is not included; that is what we have sold.

Q. Now can you state how many staples you have used since October, 1878, in the manufacture of pails by Mann Bros.?

A. I could by referring to my books.

Q. Can you tell by your books the quantity of staples you have used in that time with and what quantity of staples you used without washers?

A. I could not tell how many we have used without washers in number of pounds; we have kept no record of that.

Q. Can you in the number of pails?

A. Well, no; I can tell the number of pounds that we have used for our purposes, but I could not state how many we have used without washers—not exactly.

Q. Can you tell how many you have used with washers?

220 A. That is the same question.

Q. The same difficulty?

A. The same difficulty.

Q. Have you any recollection or knowledge so you can state what proportion you have used without and with washers?

A. I guess that I could. I would have to inquire at our factory.

Q. Will you then examine your books and give us your best recollection and information on that subject?

A. Yes, sir.

Q. You say that there is no utility in the use of this washer upon the pail, but simply that it has this effect upon a painted pail—it makes it look better and preserves it from the possibility of having the paint rubbed off by the turning of the bail; that is the fact, is it not?

A. Well, it is only a mere possibility—there is nothing in the bail that would harm a pail to get unsaleable or appear different.

Q. What quantity of pails manufactured by you are painted and what quantity not painted?

A. The largest quantity are painted.

Q. Are painted?

A. Yes, sir.

Q. Now, is it not true that the natural and almost
221 inevitable use of the bail upon the pail in that way is to mar the paint on the staves?

A. It is not.

Q. In so far it does mar it, it impairs the saleable quality of the article, does it not?

A. No, sir.

Q. Do you mean to say that you would pay as much for a painted pail that showed the paint scraped off in the neighborhood of the bail-ear by the movement of the bail, buying it for purposes of sale, as you would for one that did not have that mark upon it?

A. There is nothing there that will scrape off the paint where the bail comes in contact with the pail; the wire is round. There is a great deal more paint scraped off from the wearing of one pail that comes in contact with another in shipping, or in loading and transferring, than by the bail coming in contact with the pail.

Q. Question repeated.

A. I would pay the same money for it.

Q. Do not you know you could not sell it for as much money—it is not as saleable an article?

A. There is no such thing. You are asking an impossibility, you are asking something which don't exist.

Q. I am asking it upon the assumption it does exist; now if it does exist?

222 A. If you was a manufacture you would not ask such a question, not in that shape.

Q. You must remember that the witnesses on the part of the complainant here contradict you flatly in respect to that matter, and now I will ask you the question on the assumption of what they say the fact is and not what you say it is; and I again ask the question whether a pail with the paint rubbed off in the neighborhood of the bail-ear by the operation or turning of the bail, does not impair the saleable quality of the article?

A. It has not in our experience.

Q. Now, how many painted pails have you ever manufactured and sold without washers with the staple of the character described in Exhibit Mann or Mann Brothers?

A. We have once before understood that I should make the inquiry and I will let you know.

Q. Have you read or heard read the testimony of Purches Miles taken in New York recently, and to which your counsel has just referred you?

A. Yes, sir.

Q. In respect to what he says there about having had an interview with you in 1873 about staples, are you prepared to contradict on oath the substance of what he there testifies you said?

A. I cannot recollect all that he said; I don't contradict his testimony that we had a conversation about that staple.

223 Q. Do you contradict what he says in that testimony as he says it; I am not asking you what he said, but can you swear it is not true what he swears you stated there?

A. I would like to have the testimony read over. (Testimony read to witness.) As far as the State of Illinois is concerned I have no knowledge that I spoke to him about Illinois; and as far as his conversation with the foreman is concerned, the foreman did not like the invention—did not like the ear.

Q. The exhibit which you have produced, and which is marked "Defendants' Exhibit Gas House," you say had remained in a blind there for twelve years, how do you know that fact?

A. I know that fact by Mr. Miller telling me that he has manufactured those blinds over twelve years ago for the gas company.

Q. Mr. Miller has been a witness in this case for you, has he not?

A. Yes, sir.

Q. And the only information you have in respect to the staple remaining there twelve years you got from Mr. Miller?

A. No, sir; I went down to the gas house and requested one of the men if I could get a staple; I took this, and I asked how long that was in there; they said about twelve years; and

224 this man helped me to get the staple out.

Q. I am asking you for knowledge; you understand that is not knowledge?

A. It is not knowledge of my own; I did not put them in.

Q. Then, have you any knowledge of the time they were put in, except as you were told by those parties?

A. No.

October 18, 1879—2 o'clock p. m.

Parties and witness appeared, and the testimony is read over to him.

The witness says that he has examined his books, and finds and says: We have used in our factory about 1,700 pounds of staples without washers, and, with washers, about 2,900. These are what we have used ourselves, and does not include what we have sold.

HENRY MANN.

STATE OF WISCONSIN, *Milwaukee County.* } *ss:*

I, Phil Wiborg, notary public in and for the State of Wisconsin, do hereby certify that, by virtue of chapter 304 of the acts of Congress of 1875–'6, and in pursuance of the agree-
225 ment of counsel hereto, the foregoing deposition of Henry Mann was taken on the part of the defendants herein, before me, and that the same contains all the testimony given at the time and place of taking the same.

I further certify that I was attended by counsel for the respective parties and the witness in person, and that after the taking of such deposition, to wit, on the 18th day of October, 1879, the same was read over to the witness, and signed by him.

I further certify that I am not of counsel for either of the parties hereto.

In testimony whereof, I have hereunto set my hand and affixed my official seal, this 18th day of October, 1879.

[SEAL.]

PHIL WIBORG,
Notary Public.

(End of testimony.)

Decree dismissing Bill.

And now, at this same term, to wit, January term, 1880, and on the eighty-seventh day thereof, to wit, on the 26th day of June, A. D. 1880, the following proceedings were had, to wit:

THE DOUBLE-POINTED TACK COMPANY,
vs.
THE TWO RIVERS MANUFACTURING COMPANY,
JOSEPH MANN & HENRY MANN.
} In equity.

This day came the parties, by their counsel, and on con-
226 sideration of the pleadings and proofs in this cause and the arguments of counsel thereon, it is ordered, adjudged,

and decreed by this court, now here, that the complainant's bill of complaint in this cause be, and hereby is, dismissed, and that the said complainant pay the costs in this cause, to be taxed within ten days, or, in default thereof, that execution be issued for the same.

(Signed) CHAS. E. DYER, *Dist. Judge.*

Appeal.

And came the complainant, by its counsel, and prayed an appeal to the Supreme Court of the United States; whereupon it is ordered by the court that said appeal be, and hereby is, allowed, and that the complainant give bond for the costs of such appeal in the sum of five hundred dollars.

September 3, 1880. This day came the complainant and filed its appeal-bond in the sum of five hundred dollars, with Charles H. Anson and Horace L. Fuller as sureties, conditioned that it shall prosecute its said appeal to effect and answer all damages and costs if it fails to make its plea good, which bond is approved by the district judge, and is as follows:

Appeal Bond.

226 United States Circuit Court, Eastern District of Wisconsin.

THE DOUBLE-POINTED TACK COMPANY
vs.
THE TWO RIVERS MANUFACTURING COMPANY, JOSEPH MANN and HENRY MANN. } In Equity.

Know all men by these presents that The Double-Pointed Tack Company, a corporation organized and doing business under the laws of the State of New York, in the city, county and State of New York, appellant, and we, Charles H. Anson, of No. 1621 Grand avenue, in the city of Milwaukee and State of Wisconsin, and Horace L. Fuller, of No. 113 Sixth street, in the city of Milwaukee and State of Wisconsin, are held and firmly bound unto the above-named Two Rivers Manufacturing Company and Joseph Mann and Henry Mann, their executors, administrators, successors or assigns, in the sum of five hundred dollars to be paid to the said Joseph Mann and Henry Mann, for the payment of which, well and truly to be made, we bind ourselves and each of us, our heirs and each of our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated the 17th day of August, in the year of our Lord one thousand eight hundred and eighty.

Whereas the above-named The Double-Pointed Tack Com-

pany has prosecuted an appeal to the Supreme Court of
228 the United States to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of Wisconsin:

Now, therefore, the conditions of this obligation is such that, if the above-named, the Double-Pointed Tack Company, shall prosecute its said appeal to effect and answer all damages and costs, if it fails to make its plea good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

THE DOUBLE-POINTED TACK CO., [SEAL.]
By HENRY W. PUTNAM, *President.*
CHARLES H. ANSON. [SEAL.]
HORACE L. FULLER. [SEAL.]

Sealed and delivered in the presence of—
G. C. MARKHAM.
RUDOLPH STAFFORD.

UNITED STATES OF AMERICA, } ss:
County of Essex, State of New York. }

On this 23d day of August, 1880, before me, personally came Henry W. Putnam, to me personally known, and also known to me to be the president of the Double-Pointed Tack Company, described in the foregoing obligation, and who, as such president, executed the same, and acknowledged the execution thereof.

[SEAL.] A. A. MORSE,
Notary Public, Essex Co., N. Y.

UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin. }

229 On this 17th day of August, 1880, before me, personally came Charles H. Anson and Horace L. Fuller, to me personally known, and also known to me to be the persons described in and who executed the foregoing obligation, and acknowledged the execution thereof.

[SEAL.] GEO. C. MARKHAM,
Notary Public, Milwaukee Co., Wis.

UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin. }

Charles H. Anson and Horace L. Fuller, the persons mentioned in and who executed the foregoing obligation, being duly severally sworn, say, and each for himself says, that he is a citizen of the United States, residing therein; that he is a free-

holder within the State of Wisconsin, and is worth the sum of one thousand dollars over and above all debts and obligations and property exempt by law from execution.

CHARLES H. ANSON.
HORACE L. FULLER.

Sworn to before me this 17th day of August, 1880.
GEO. C. MARKHAM, *Notary Public.*

Endorsed: Approved. CHAS. E. DYER, Dist. Judge.

Whereupon a citation issued.

230 *Opinion of the Court.*

U. S. Circuit Court, Eastern District of Wisconsin.

THE DOUBLE POINTED TACK COMPANY,
vs.
THE TWO RIVERS MANUFACTURING COMPANY, AND OTHERS. } In equity.

1. Invention—Combination.—A patent for a combination composed of a mere aggregation of parts which have no common function, is void for want of invention.

2. Same—Staples.—In the present state of the art, a staple having its points run at a certain angle, and both points beveled on the same side, so that they incline or bend in the same direction when driven into wood, and adapted for use upon pails, is not such an invention as will sustain a patent.

Murphey & Goodman, for Complainant.
Finches, Lynde & Miller, for Defendants.

Dyer, D. J., Complainants rights depend upon the validity of a patent issued February 10, 1874, for an improvement in bail-ears used upon pails. One Purches Miles was the alleged inventor of the device in question, and filed an application for a patent November 11, 1873, but the grant of letters patent was made to complainant, Miles having assigned to it his right, title, and interest in said invention. In his specifications the inventor makes this admission:

232 "Wire staples have been employed to form the fastening-eyes for bails, and these have been driven into the wood with the penetrating points nearly at right angles to the surface, and in use they are liable to pull out by the weight." He then describes his invention as follows: "My invention consists in a bail-fastening staple made of wire, with the penetrating ends cut at such an angle that, in driving them into the wood, they will assume an upward inclination, so that the weight will tend to force such

points inwardly, rather than to draw them out, and the bending of the ends in clinching will always be upwardly, thus making a much better and more reliable article than heretofore; and I combine with such fastener a convex metallic washer, to keep the bail from contact with the wood or the paint thereon."

The claims of the patent are as follows:

"1. The compound staple-fastening D, for bails, make with the diagonally cut penetrating points 2 and 3, loop 4, and body 5; said diagonally cut points being positioned as set forth, so as to bend upwardly in driving into the wood. "2. The convex metallic washer E, in combination with the compound bail-fastening staple D, having upwardly penetrating points 2, 3, and loop 4."

Drawings of the device annexed to the specification show a staple fastening with two penetrating points or prongs; the upper prong being longer than the lower. The lower prong runs
232 at an acute angle, and the upper prong at an obtuse angle, from the body of the staple; the prongs as shown in the drawings, having an upward inclination. The points are beveled or cut diagonally on the lower sides, so as to cause them, when driven into the wood as it is claimed, to turn upwardly and clinch as they are being driven. The washer used in combination with the staple, to keep the bail from contact with the wood, is an ordinary convex metallic washer. The patent as to the first claim is attacked for want of novelty, and as to the second, because it is, as claimed, for a mere aggregation of parts.

Concerning the second claim I have no doubt, as we have seen, that claim is for the convex metallic washer in combination with the staple. It is not perceived how the washer can be said to cooperate with the bail-ear in the production of a common result. It may give greater finish to the pail, and prevent the bail from rubbing and disfiguring the wood at the point where the bail is fastened to the ear, but the union of the two devices does not contribute necessarily to one or the same result, and does not involve invention. The bail-ear and the washer perform separate and distinct functions, the distinct office of neither being changed or affected by the operation of the other. The function of the bail-ear is to afford a staple fastening for the bail. The presence of the washer does not contribute to nor aid the complete-
233 ness of the connection between the bail and the bail-ear, nor the attachment of the bail-ear to the pail. The addition of the washer, which is an old device, makes a mere aggregation of parts, in which each device performs its separate functions, without producing anything new in operation or result by the combination. In other words, the bail-ear performs the same function without the washer as with it.

The point is well put in *Gidden* vs. *Copeland*, 15 *O. G.*, 921, where it is said: "The fact that the knives, the rake and the

binder are respectfully subordinate combinations, performing distinct operations, is not fatal to the patentability of a combination of these devices in a harvester, for they all co-operate to produce one definite result. But the combination of a tool chest or feed box with these other elements would not be a patentable combination, because, whatever these appendages may contribute to the production of a convenient or useful harvester, they would not co-operate with the other devices in the production of any one precise result."

Plainly, no invention was necessary to combine the washer with the bail-ear, and I regard complainant's patent as to the second claim void, because it is for a mere aggregation of parts which have no common function. In passing upon the first claim in complainant's patent it is essential that we ascertain precisely what the patented invention is. The proofs
234 clearly show that prior to complainant's patent wire staples were employed for the purpose of attaching the handles to pails, and that the use of such staples for that and other purposes was old. In view of the state of the art it is unquestionably necessary, in order to support complainant's patent, that it be shown that his device presents a feature not before in existence, and which it required invention to produce. As showing the state of the art defendants have introduced in evidence numerous samples of staples and various patents granted both before and subsequent to complainant's patent. The Walton patent, granted in 1868, shows a bail-ear constructed of wire, bent so as to have an eye, in which the bail is fastened, and two prongs of equal length. This device is unlike complainant's, as plainly appears on the face of the specifications and claim, because the prongs are intended to be inserted in holes in the sides of the pail, passing entirely through the same and clinched upon the inner side. Nor does the device, as I understand it, show beveled prongs; certainly, not prongs both beveled on the under side. This patent was re-issued in 1876, and the claim in the re-issued patent is: *First*, as a new article of manufacture, a bail-ear for pails, made of wire, bent to form a loop, and having two prongs that are clinched; *Second*, the combination of the staple with the bail-ear; *Third*, a bail-ear made of wire and having an eye for the bail between the two prongs.

235 The Krichbaum patent, granted in 1869, discloses a staple having two prongs or points, one above the other; but these prongs are not beveled on their lower sides, and evidently are not made to penetrate in an upward direction, nor are they intended to be driven into the wood, as complainant's device is. The specifications in the patent state that "these ears are secured to the pail by first boring holes therein, in which the prongs are inserted, which being done they are then clinched down upon the

inside." This device, therefore, does not exhibit the characteristic of the Miles invention, viz: upwardly penetrating points, both arranged to turn in the same direction in the wood in driving.

Miller's patent, granted in 1874,—a caveat for his device having, however, been filed in the Patent Office in August, 1873,—shows a staple with two points projecting at directly right angles to the bail-ear, each of which points is notched; and in the specifications of the patent it is stated that "the ears are attached to the opposite sides of the bucket, keg, or cask, by driving the projecting portions through the bucket, the top one being near the rim of the other, a short distance down the side, and the projecting ends clinched or swaged, the notches facilitating this operation." The claim in this patent is a broad one, since it is for an article of manufacture, being "the combined bucket, bail and ears, described, the latter constructed of flat iron, with its lower
236 end rounded to pass through the side of the bucket, and the other end rounded and bent upon itself to form a loop, and terminating in the prong constructed to pass through the side of the bucket." This patent was re-issued in 1877, and the claim in the re-issued patent is for "bail-ear and bail, and as an article of manufacture, the combined bucket, bail, and ear." A prominent feature of the Miller device is the notch in the end of the prongs, and it is plain that the patent does not show a staple having the lower sides of the prongs beveled, and so adapted as to give the points when driven into the wood an upward inclination.

There is also in evidence the rejected application of one Collins for a patent for an improved bail and tub ear, which application was filed in 1868. A drawing of this device shows a diagonal cut at the point on the upper side of the upper prong of the ear, and a diagonal cut at the point on the lower side of the lower prong. From the description of this device, given by the inventor in his application for a patent, it is evident that it is intended that the two prongs are to be driven entirely through the stave, and then clinched on the inside of the pail—the diagonal cut of the points, as described, being evidently made to facilitate such clinching. Collins' application was rejected because it was found that his device was anticipated by the patent of
237 Walton—the prongs of both devices being, as before stated, intended to pass entirely through the side of the pail, and clinched on the inner side.

Now, it is probably true that in the particulars in which all these devices, including complainant's, have features in common, complainant's patent, if valid, is subordinate to one or more of the patents referred to; but none of these various devices show a construction in form like that of the complainant's, and none

show the lower sides of both points of the staple beveled or cut away so as to cause them to bend upwardly and clinch within the wood when being driven, and this I regard the essence of the Miles invention, if that characteristic of his device can be said to be an invention; and this, I take it, is the whole point of complainant's case. The proof is abundant that the use of wire staples to form the fastening eyes is, and was at the time complainant's patent was granted, old. Samples of staples used for various purposes many years have been put in evidence, among which is the staple used on the thill of a wagon for the purpose of holding the saddle strap and the back breeching strap, and also the staple used on harness hames, both of which are similar in form to complainant's device, except that the prongs do not run from the body of the staple at the angle shown in complainant's staple, nor are the points of the wagon thill and the
238 hames staples beveled on any particular side, but are somewhat flattened on each side, or made pyramidal at the points, so that they may be driven with facility through the wood or inserted in holes made through the wood and swaged down upon the under side. Samples of other common loop staples are shown, some of which appear to have diagonal cuts at the points, but it is perhaps a curious circumstance that none of them show the diagonal cut on the same side of each point, particularly on the lower side of both points.

Now, it is claimed by counsel for defendant that such a state of the art and such a common knowledge with reference to wire staples existed at the time complainant's patent was granted as deprives the patentee of the Miles device of the right to insist that his device was the result of invention; and it is especially urged that, as the Collins device shows one of the points of the staple beveled on the lower side, there was no invention on the part of Miles in making both the points of his staple beveled on the lower side; and since we find that wire staples for bail-ears were old when Miles conceived his device, and since, therefore, his invention cannot relate broadly to all kinds of staples, nor even to the simple cutting of a penetrating point diagonally, it becomes a question whether it was invention to devise and make a staple fastening for bails with both points cut diag-
239 onally on the under side so as to accomplish the purpose designed, viz., to bend the points upwardly in the act of driving. Plainly, if there is anything patentable in complainant's device, it is the diagonal cut on the same side of the two points. A claim of novelty based upon the form of the body of the staple is not well founded, because a staple of substantially the same form of body is old, as is shown by exhibits in evidence. A mere reduction in size of an old device so as to make it small enough for a new use cannot support a claim to a patent. The wagon-

thill staple is very similar in form to complainant's, the differences, as before remarked, being in the relative length of the lower prong, the angle at which the prongs run from the body of the staple, and the beveled points. As stated by one of the witnesses, the effect of driving the staple in question into wood would be to incline the points upward, while the thill staple, if pointed straight, would pass perpendicularly through the wood. That the effect of the bevel is to force the beveled point in an opposite direction from the bevel, and that this is common knowledge in mechanics, cannot be regarded as open to dispute. The principle is constantly illustrated and shown in the use of the chisel. Although witnesses for defendants have on cross-examination testified that they have not known of a double-pointed tack or staple cut with the bevel cut on the same side of both points, the evidence
240 clearly shows that double-pointed staples with diagonal cuts on different sides of the points were old when complainant's device was patented.

The principal witness for complainant, who procured for Miles the patent in question, says, in his testimony: "In the said letters patent of complainant, the second paragraph makes a very broad admission, to the effect that wire staples have been used for fastening the eyes of bails to pails, and that these staples have been driven into the wood, with penetrating points, nearly at right angles to the surface. I am also aware, and was aware before preparing the papers for said patent, that the penetrating points of staples had been formed in a variety of manners, among which I name the cutting of the wires diagonally, the diagonal cut generally being on the flat side of the staple."

Other testimony and exhibits in evidence show single-looped staples in use anterior to complainant's device, with diagonal cuts on the opposite sides of the two points, so that, in driving them, one point would be forced in one direction, and the other in an opposite direction. All this shows that the idea of a diagonal cut on the penetrating points of staples was not new with Miles, and that all that he can claim as new with him is the diagonal cut on the same sides of the two points, and the angle at which the points run from the body of the staple, as shown
241 in his device. This is what Miles invented, and nothing more; and since we find that the form of the body of his staple, and the diagonal cut of the penetrating points, were old when he devised his staple, I am of the opinion that the angle at which the prongs run from the body of the staple, and the fact that in his device both points are cut diagonally on the under side, do not give to the device such originality and novelty as are essential to patentability, nor, in my judgment, can the mere fact that it is so constructed as to be adapted to use upon pails make it patentable. The leading feature of complainant's

device, though it may give to it utility and value, seems to have been produced rather by mere change of form from that of devices which preceded it than by originality of construction. The adjustment of parts is purely mechanical, and, in the previous state of the art, required only the exercise of mechanical skill. A staple with one point beveled on one side, and the other point beveled on the opposite side, was old. It was common knowledge that, as the points should be driven into the wood, they would be forced in different directions, because each point would be pushed in an opposite direction from the bevel. Now, the construction of a staple so that both points should be beveled on the same—that is, the under side—thereby causing both points, when driven into the wood, to incline or bend in
242 the same direction—that is, a direction opposite to the bevel—would seem to be, in the language of the Supreme Court, "but the carrying forward, or new or more extended application of a thought original with others," or well known in mechanics, and not such an invention as will sustain a patent.

The learned counsel for complainant, in argument, relied strongly on the case of Rogers *vs.* Sargent, 7 Blatch., 507, which involved the validity of a patent for a wire staple with corrugated or indented backs or ends. In that case the patent was sustained, and counsel have argued that the invention was merely a corrugated staple, the mere use of a piece of corrugated wire, such as every one had seen long before, but which, when bent into a staple, produced a particular and novel effect. But an examination of the opinion of the court shows that the decision of the case was made to rest upon peculiar and special grounds. The patentee's staple was formed by compression between dies, and it appeared that his claim was granted by the patent office "as a claim to a staple, the shanks of which were to have a rounded edge in the direction of their width, a sharpened edge in the direction of their thickness, and transverse indentations, *when those three qualities were produced by compression between dies, as contradistinguished from forging the points and*
243 *cutting the barbs by a chisel.*" And it was this difference, leading to the production of the article at a cheaper rate by the new method, which was regarded by the Patent Office as a patentable difference. And it is evident, from the opinion of Judge Blatchford, that he sustained the patent upon that ground, for he says: "The evidence shows that the patented staple could not be made by hand at a price which would admit of its profitable manufacture; that the sale of it made by dies, by machinery, has been very great, and that it has altogether superseded the non-serrated staple before used for blinds. In view of these facts, I think the re-issued patent is valid, and the claim sustainable in law. The words 'constructed substantially as above described,'

in the claim, cannot be regarded as having reference solely to the construction of the staple into a staple with transverse corrugations, and so formed as to penetrate wood easily, and be withdrawn therefrom with difficulty."

* * * * * *

"They mean not only staples of such a shape that they can readily be inserted into wood and with difficulty be withdrawn from it, *but staples made into such shape by the action of dies, which form the corrugations by swaging. To this idea of the use of dies, enabling the article to be made by machinery, is to be attributed the utility and success of the invention. This use of dies to make the cor-*
244 *rugations*, and not merely the reduction in size of the spike, forms part of the adaptation of the spike for use in blinds. And the article, *when so made by dies*, is a new commodity or article of manufacture."

So it clearly appears appears that the patent was sustained for the reason that the corrugations were, under the patentee's claim, to be made by the use of dies, thus enabling the articles to be constructed by machinery, so that it should become a new article of manufacture. This is the special ground upon which the opinion proceeds in establishing the patentee's rights; and, therefore, I do not regard the case as one in which it is unqualifiedly held that a patent which merely covers a staple having indentations of equal depths, and over the whole surface, is valid. The particular features of the patentee's invention, to which attention has been called, evidently controlled the decision of the case.

Without pursuing the case at bar further, I am of opinion that complainant's patent must fall, because of the want of patentability of the device in question.

245 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Wisconsin. }

I, Edward Kurtz, Clerk of the Circuit Court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with the originals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom; being a full and complete transcript of the record and proceedings in the case of The Double Pointed Tack Co., *vs.* The Two Rivers Manufacturing Co., *et al.*, in equity, with complainants Exhibits "Joseph Stoffel," "B," "C," and "F," and defendants' Exhibits Board, "A," "B," "Mann," "Mann Bros.," "Gashouse," "Money," "More Money," and "C," which accompany the same separately.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 24th day of September, in the year of our Lord, one

thousand eight hundred and eighty, and of the Independence of the United States, the one hundred and fifth.

[SEAL.] EDWARD KURTZ, *Clerk.*

246 UNITED STATES OF AMERICA, *ss:*

[SEAL.] To the Two Rivers Manufacturing Company, Joseph Mann and Henry Mann, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal in the circuit court of the United States for the eastern district of Wisconsin, wherein The Double-Pointed Tack Company is appellant and you are appellees, to show cause, if any there be, why the decree passed against the said The Double-Pointed Tack Company should not be reversed, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, this third day of September, A. D. 1880, and of the Independence of the United States the 105th.

CHAS. E. DYER, *Judge.*

We accept service of the above citation this 8th day of September, A. D. 1880.

FINCHES, LYNDE & MILLER,
Sol'rs for Defendant.

Endorsement on cover: E. Wisconsin, C. C. U. S. No. 323. The Double-Pointed Tack Company, Appellant, *vs.* The Two Rivers Manufacturing Company, Joseph Mann and Henry Mann. Filed 9th October, 1880.

119-117

FILED
OCT 8 1883
JAMES H. MCKENNEY, CLK

Supreme Court of the United States

No. 78.

THE DOUBLE-POINTED TACK COMPANY,
Appellant,

vs.

THE TWO RIVERS MANUFACTURING COMPANY, JOSEPH MANN AND HENRY MANN.

BRIEF ON BEHALF OF APPELLANT.

ARTHUR v. BRIESEN,
Attorney for Appellant.

NEW YORK:
EVENING POST JOB PRINTING OFFICE, cor. BROADWAY AND FULTON STREET.
(Law Telephone No. 541.)

1883.

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Appellant,
vs.
THE TWO RIVERS MANUFACTURING COMPANY, Joseph Mann and Henry Mann.

BRIEF ON BEHALF OF THE APPELLANT.

Statement of the Case.

This suit was brought in equity by the appellant, the assignee of Letters Patent No. 147,343, against the appellees, who are manufacturers of metallic wares in Milwaukee, for infringement of said patent. The bill was dismissed in the court below, on the ground that the subject-matter of the first claim of the patent did not, in view of the state of the art, involve the exercise of inventive genius, and on the further ground that the subject-matter of the second claim of the patent, which purports to be for a combination, was for a mere aggregation of parts, that do not enter into relation with one another, to an extent sufficient, to deserve the name of a combination, and that, therefore, the complainant's patent is void.

The patent, which bears date February 10, 1874, was obtained by one P. Miles, the assignor of appellant, for an Im-

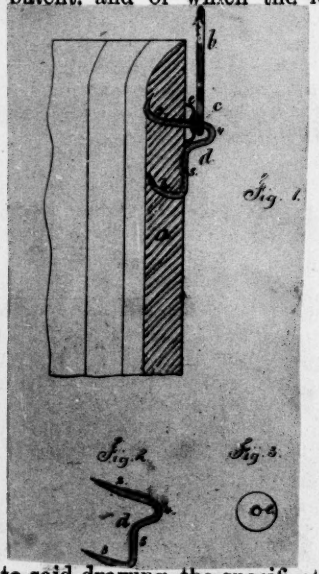
provement in bail-ears. Bail-ears are the loops or eyes on pails, buckets, and the like, which receive the ends of the bail or handle. They are rigid attachments to the pail or bucket, but form swivel connections with the bail or handle.

The patentee, Miles, in his specification, which is reproduced on page 21 of the record, says:

"*Wire staples have been employed to form the fastening eyes for bails, and these have been driven into the wood, with the penetrating points nearly at right angles to the surface, and in use they are liable to pull out by the weight.*

"*My invention consists in a bail-fastening staple, made of wire, with the penetrating ends cut at such an angle, that in driving them into the wood, they will assume an upward inclination, so that the weight will tend to force such points inwardly rather than to draw them out, and the bending of the ends in clinching will always be upwardly, thus making a much better and more reliable article than heretofore; and I combine with such fastener a convex metallic washer, to keep the bail from contact with the wood or the paint thereon.*"

The specification then refers to the drawing which accompanies the patent, and of which the following is a reproduction:



Referring to said drawing, the specification continues:

"*The wood-work,* a, *represents part of a pail or tub, and the bail,* b, *is of wire, having eyes,* c, *at the ends, which are bent, so as*

to stand parallel, or nearly so, to each other. The compound staple fastening, d, *is made with the penetrating points,* 2, 3, *loop* 4 *for the eye,* c, *and the body* 5. *The ends,* 2, 3, *of the wire are cut diagonally, so that in driving them into the wood, the tendency is to bend upwardly and clinch, and they will usually be long enough to pass through the wood and be clinched. The body* 5, *of the fastening stands vertically, or nearly so, and will usually be partially embedded in the wood. The sheet metal washer,* e, *prevents the eye,* c, *coming against the wood. The points of the staple penetrate the wood upwardly, so as effectually to prevent the staple pulling out under the ordinary strain to which it is subjected.*"

The claims are as follows:

"1. *The compound staple-fastening,* d, *for bails, made with the diagonally-cut penetrating points* 2 *and* 3, *loop* 4, *and body* 5, *said diagonally-cut points being positioned as set forth, so as to bend upwardly in driving into the wood, as set forth.*"

"2. *The convex metallic washer,* e, *in combination with the compound bail-fastening staple,* d, *having upwardly penetrating points* 2, 3, *and loop* 4, *as and for the purposes specified.*"

It will be perceived from an examination of the patent, that the patentee, if his statements are correct, succeeds in embedding in the wood of the pail *two hooks* for each end of the bail, each of said hooks having its concave face on the upper side, so that in reality the pail becomes suspended on four *curved* supports, the curvature of which is such that each particle assists in supporting the load, and at the same time braces, by its outer metallic connection, the other hook to which it is joined. A more practical means of suspending a load cannot possibly be imagined.

Infringement.—As to the question of infringement, there seems to be no controversy; certainly there should not be, for the bill charges infringement, willful infringement (see page 3 of the Record), and the answer (pages 9 to 13 of the Record) does not deny it. In addition to this, it is proven and admitted that the defendants have made, before the commencement of this suit, pails like "Exhibit A, Joseph Stoffel," and bail-ears like "Complainant's Exhibit C," and like "Defendants' Exhibit Mann Bros."

The testimony of Joseph Stoffel, who bought the pail, "Exhibit A, Joseph Stoffel," on the 18th day of October, 1878, has, by an unaccountable oversight, been omitted from the record of this court, but we understand that its sale is not denied; yet, even if it were denied, as to that specific pail, the answer admits it. It is also admitted (see page 45 of the Record) by Mr. Mann, one of the defendants, that "Exhibit Mann Bros."

was manufactured by the defendants, and in his testimony on pages 44, 45 and 49 of the record said Mann says, that he first bought these goods of the complainant, then made them like "Exhibit Mann Bros.," and in October, 1878, just before this suit was brought, but after he had been warned to discontinue the infringement, he began to make staples like "Exhibit Mann." "Exhibit Mann Bros.," of which the following is a sketch:

is a staple having the characteristics of that described in the first claim of the Miles patent, namely: it has the diagonally-cut penetrating points 2 and 3, cut at such an angle, that they will bend upwardly in driving them into the wood, and it also has the loop 4 and the body 5; hence it is a clear infringement of the first claim of the patent, and having been sold, as in "Exhibit A Stoffel" with the washer, it is also covered by the second claim of the patent. That such is the fact appears affirmatively from the evidence of Mr. Miles in complainant's opening testimony (pages 16 to 18 of the Record).

The staple made by defendants after October, 1878 and which is like "Exhibit Mann," of which the following is a sketch:

has all the characteristics of the patented staple, but omits the body 5, leaving the prongs to project directly from the open loop 4. Mr. Mann testifies to the reasons that guided him in adopting this construction in October, 1878, after he had been warned of infringement, as follows (see page 46 of the Record):

"*The staple of the Double-Pointed Tack Company, the lower prong runs at an acute angle from the body of the staple, while the longer point runs on an obtuse angle; while our staple is intended to run on a square from the body, and the two points run parallel to each other and at right angles to the body of the staple. Now, I would explain here that there was no purpose in doing that, our machine made them in that way, never thought of it. When I*

heard so much talk about it I thought of running it in different, and then the reason we made "Exhibit Mann" is, it is just as good as Complainant's "Exhibit C," every part of it, and it takes one-third less wire to answer the same purpose. I mean by this staple "Exhibit Mann."

That "Exhibit Mann," which is the staple adopted by the defendants since October, 1878, and as to which complainant, at the time it took its opening proofs, had no knowledge (the opening proofs being limited to staples that were substantial fac-similes of complainant's), is, nevertheless, also within the scope of complainant's patent, appears from the testimony of Mr. Serrell in rebuttal (page 107 of the record), and it is quite clear, that although the first claim of the patent is limited, by including the body 5 as one of its necessary elements, and does therefore possibly not embrace a structure like "Exhibit Mann," yet the second claim, by studiously omitting the body 5, clearly covers it.

But for the purpose of the questions before this Honorable Court, reference to "Exhibit Mann" is perhaps superfluous. It may, in case the court rules with the appellant on the main issue of the appeal, which simply is whether the complainant's patent is valid in view of the state of the art, be left to the Court below, to apply the construction, given to the patent, to whatever goods defendants may have made between the date of the patent and the time of the accounting, it being sufficient at present, that the infringement is admitted, provided the patent is valid.

Date of Complainants Invention.—The complainant's patent bears date February 10, 1874. The application for it was filed, as the answer admits on page 10 of the record, on the 11th day of November, 1873.

The date of invention is given in the testimony of Mr. Miles which he gave in a certain interference proceeding in 1876, to which we will hereafter refer, as March, 1873 (see pages 78 to 81, inclusive, of the Record).

In the same testimony Mr. Miles says in reply to question 13, page 79, that between March and October, 1873, he showed the invention to Mann Bros. of Milwaukee, their name being misspelt in the record. In his testimony given for the present suit, Mr. Miles again testifies (see page 110 of the record) as follows :

"*Q. Did you ever show this invention to the defendants? A. Yes, sir.*

Q. When? A. In the summer of 1873 ; *that was within a few months after I made the invention.*

Q. Did you then explain to them the advantage of the diagonal cut on the points being parallel? A. Yes, sir.

Q. And what did they say? A. They thought it was an excel-

lent thing, and wished to buy the right, if I obtained the patent, for the States of Wisconsin and Illinois, especially of Wisconsin; I took pains to explain that point-feature to them and did so very particularly.

Q. Whom did you see at the interview in the summer of 1873? *A. Mr. Henry Mann and his brother, also the foreman of the factory at the Two Rivers, Wisconsin.*"

Mr. Henry Mann, in sur-rebuttal, has his attention called to this testimony (see page 117 of the Record) and says with regard to it:

"*Q. If you had wished to buy the patent, was there any objection made on the part of Mr. Miles to sell the patent to you? A. He said that he would inquire or find out and let us know, but he never let us know and we never wished to buy it; I made no offer; I want that to be understood; I made no offer for the patent, I did not offer a cent; I talked at random.*"

On page 120 of the record he testifies again regarding this interview, and substantially admits that Mr. Miles' version is correct. Thus it is established that the invention was made by Mr. Miles in March, 1873; that he applied for his patent in November, 1873, and that he explained it to the defendants between March and October, 1873, who at that time acknowledged the advantages of the invention, and who thereupon bought of the complainant the patented staples, until, finally, they began to manufacturing them on their own account. We are, therefore, not dealing with an innocent infringer, but with one who was fully aware of the complainant's claims when he entered into the manufacture of the goods complained of.

State of the art.—In order to show that the patent is void, the defendants have offered in evidence three patents, one caveat, one rejected application for a patent, and examined five witnesses to demonstrate the state of the art. They also appear to rely upon a certain interference record in which the complainant's patent was involved. We will take these references up in their order.

First.—The Walton patent (page 51 of the Record) bears date May, 1868, and shows a bail-ear which is made of two staples, the four ends of which are turned *down by clinching on the inside,* as shown in Figure 2 of said patent. In each staple the prongs enter the wood in the same horizontal plane, and the upper staple is used to prevent the lower one from being pulled out, the downward direction in which these prongs are clinched facilitating the removal of the bail-ear from the pail by an upward pull.

Mr. Walton himself was a witness in the interference proceeding between Miller and Miles, and his testimony as there given in the year 1876, will be found on pages 64 to 70, inclusive, of the record. He admits that he abandoned his invention, because he found something else better (see Answers 26 and 27, page 70 of the Record); certainly, there is no evidence by the defendants to the effect that the Walton patent meets complainant's patent. The Walton staple cannot be driven into the wood; four holes must be bored through the pail to receive the prongs, which are then clinched down upon the inside (see page 51 of the Record); when the pail is loaded there is nothing but frictional contact between the metal and the wood to prevent these staples being pulled out, and evidently this structure has never come into use, and was abandoned by its own inventor, because it was entirely impracticable and useless.

The Krichbaum patent of May, 1869, is next in order. It shows a staple having wedge-like prongs, one above the other, which cannot be driven through the wood, but which, as the Krichbaum specification states, on page 52, are applied "*by first boring holes in the pail, in which the prongs are inserted, which being done, they are then clinched down upon the inside, as shown at C, Figure* 1." At *C*, in Figure 1 of said patent, is shown a *horizontally* clinched inner end of one of these prongs. The attention of the court is here called to the fact, which will become important as we consider the second claim of complainant's patent, that the loops for receiving the bail in the Walton and Krichbaum patents are parallell with the walls of the pail, while in the patented structure of complainant they stand at right angles to the pail.

The Miller *patent* is the last patent reference. This Miller patent, of which the reissue appears in the record (pages 112 and 113) shows a staple, formed of one piece of wire, with two prongs that are notched at the ends and forming also a loop, which is completely closed, and not open, as in complainant's structure. The date of the Miller patent is April 14, 1874, later, therefore, than that of complainant, and there is no testimony in the record to show that Miller anticipates Miles in regard to any invention which is claimed in the Miles patent.

And even if Miller anticipated Miles in regard to so much of the bail-ear as is common to both, such anticipation would, nevertheless, not meet any of the claims of complainant's patent.

The Miller *caveat*, which is reproduced on page 54 of the record, should not be regarded as an anticipating reference. The statute does not make caveats, which are in the secret archives of the Patent Office, evidence of anticipation. Moreover, the Miller caveat of August, 1873, is antedated by the Miles date of invention heretofore referred to (see pages 71,

78, 104 and 110 of the Record). That which is shown in the Miller caveat is not the invention claimed by Miles, for the Miller caveat shows the bail-ears to be provided with tapering prongs that are beveled on both sides, so that they will remain straight when driven.

The Collins rejected application (page 99 of the Record) was filed February, 1868. This court has held in the Corn Planter Case (23 Wallace, page 181), that the reference to rejected applications for patents is not proper, by itself, in an endeavor to prove anticipation. Proof of actual prior use of the Collins staple, is entirely wanting. There is nothing before the court regarding the Collins application, but that document itself. Collins shows a staple with a slight bevel on the outer sides of the prongs, that is, on the upper and lower sides of the upper and lower prongs, respectively. The construction and operation of this device is best explained in the language of Judge Dyer in the opinion given by him on the determination of this suit (page 127 of the Record).

"*There is also in evidence the rejected application of one Collins for a patent for an improved bail and tub ear, which application was filed in* 1868. *A drawing of this device shows a diagonal-cut at the point on the upper side of the upper prong of the ear and a diagonal-cut at the point on the lower side of the lower prong. From the description of this device given by the inventor in his application for a patent, it is evident that it is intended that the two prongs are to be driven through the stave,* AND THEN CLINCHED ON THE INSIDE OF THE PAIL, *the diagonal cut of the points being evidently made to facilitate such clinching. Collin's application was rejected because it was found that his device was anticipated by the patent of Walton, the prongs of both devices being, as before stated, intended to pass entirely through the side of the pail, and* CLINCHED ON THE INNER SIDE."

Such is the record evidence of patents and papers. No expert witness is examined by the defendants to show that, or, if so, how, these patents affect the complainant's patent. Justice Clifford in "Miller *et al. against* Smith *et al.*" (vol. 18, *Official Gazette*, Patent Office, Nov. 2, 1880, pages 1047, 1048) says:

"Exhibits introduced by a party without needful explanation do not deserve, and will not receive much consideration."

And Justice Blatchford, in "Putnam *against* Vom Hofe" (19 Blatchford, p. 63, 68), also says:

"No witness for the defendants gives any testimony as to anything in either of these patents, and, therefore, they cannot receive much attention."

The court below, after describing these patents, the Miller caveat and the Collins rejected application, came to the conclusion respecting them which it expresses in the following manner (page 127 of the Record):

"*Now, it is probably true that in the particulars in which all these devices, including complainant's, have features in common, complainant's patent, if valid, is subordinate to one or more of the patents referred to; but none of these various devices show a construction in form like that of the complainant's, and none show the lower sides of both points of the staple beveled or cut away so as to cause them to bend upwardly and clinch within the wood when being driven, and this I regard the essence of the Miles invention, if that characteristic of his device can be said to be an invention; and this, I take it, is the whole point of complainant's case.*"

The defendants' witnesses are the following:

Esch, who testifies that "Defendants' Exhibit A," which is a piece of a wagon shaft, and carries a hold-back staple of certain construction, is old and commonly in use. This staple has pyramidal points, which, when it is driven, will carry the points straight through the wood, also splitting the latter, as appears from the exhibit.

Owens, the next witness, recognizes "Defendants' Exhibit C" as an old device, and also "Defendants' Exhibit A." "Defendants' Exhibit C" is substantially the same as "Defendants' Exhibit A"—that is, a staple with pyramidal points.

Willer recognizes the old Boardman staple, which is a blind staple, having the prongs beveled on their flat sides, as an old device.

Money produces exhibits "Money" and "More Money," one of which is a staple having the diagonal cuts on the flat sides, while the other has the diagonal cuts on the outer, narrow sides of the staple.

Fisher, the next witness, testifies to having used things like "Defendants' Exhibit B," which is a staple having round prongs that are not beveled on any side. As to none of these exhibits does the defence adduce any explanatory testimony; that is to say, testimony that will explain the bearing of these structures upon the complainant's patent. But the complainant, in its rebutting evidence, calls Mr. Serrell, who, regarding these devices, testifies (p. 108) as follows:

"*At the request of complainant's counsel I have examined the staple marked Defendants' Exhibit "Money" and Defendants' Exhibit marked "More Money," and I do not consider that the same correspond with the staple called for in the patent of complainant; and in fact staples of this character are expressly disclaimed in the said patent. My opinion is that they are practically valueless for the purpose of attaching bail-ears, because the ends of the staple, in driving, are liable to turn in such a manner as either to split the wood or else to bring the points of the staple*

together so as to grasp only a small portion of the wood and render it liable to pull out that small portion of the wood.

"I have also examined Defendants' Exhibit A, and the same is not in any manner adapted to a fastening for bail-ears; neither does it contain the features called for by the said Letters Patent, for the reason that the penetrating points of the hold-back fastening, Exhibit A, are made wedge-shaped, and the wedge, being on the flat sides of the staple, and equally on both sides, tends to split the wood, as appears by the exhibit itself, and there is no tendency to bend the points of this hold-back fastening in the act of driving. Upon reference to Defendants' Exhibit C I find that the hold-back fastening is made with penetrating points, tapering on all four sides, similar to a wrought nail; the intention being that the said points shall drive into the wood straight, and, passing through the wood, composing the tongue of the wagon, the point is to be afterwards clinched; the points in this Exhibit C are not of the character called for by the Letters Patent of complainant, because in the Exhibit C the points are pyramidal, while in the Letters Patent the points are formed by the diagonal-cut upon a cylindrical wire, having in view the object which is set forth in the claim, that the points will bend upwardly as they are driven into the wood.

"Upon reference to Defendant's Exhibit B I find that the staples thereon, to which the hooks of the traces or tugs are connected, have been formed of cylindrical wire, and that the hames have been bored with holes, through which the ends of the staples pass; and that washers have been applied around the ends of these staples, and said ends riveted. There is nothing in this Exhibit B, corresponding with the devices set forth and claimed in complainant's patent, because the points have not been cut diagonally; neither have they been driven into the wood, so as to clinch in the act of driving."

Finally, the defence refers to a certain interference proceeding, which took place between the application of Miller for his reissue and the patent of Miles. In this interference proceeding the point in controversy, was, as appears from the Examiner's opinion, page 102, from the opinion of the Examiners-in-Chief, page 104, from the opinion of the Commissioner of Patents, which is printed in Volume 11 of the *Official Gazette*, page 197, and from the testimony of Mr. Serrell, page 109 of the record, the following:

"A bail-ear having two lateral prongs formed of the same piece of metal, the upper prong and the body of the ear being directly connected by a single loop."

Miles knew well enough that neither he nor Miller was entitled to such a claim, and if the court should wish to inspect the interference record it will find that Miles' endeavor was to show that such a bail-ear was old and in common use long before either party to the interference made his own specific invention. But, as the court will find from an examination of

the opinions of the Examiner and the Board of Examiners-in-Chief and the Commissioner, these authorities deliberately shut their eyes to the evidence of prior public use of the invention in dispute, and decided the interference upon the ridiculous proposition that Miller proved that he had "invented" the thing in controversy in October, 1872, while Miles had made his particular invention in April, 1873. In other words, the Commissioner of Patents gave Miller the claim in his reissue on the sole ground that Miller had not seen the anticipating devices, which the record showed had been in prior use. This interference proceeding, therefore, if it shows anything, shows the honesty of Mr. Miles' proceedings. He admits knowing such things as "Detendants' Exhibit A" and "Defendants' Exhibits B and C" to have been in common public use, also such things as "Exhibit Money ' and "Exhibit More Money." These things, which were useless for bail-ears, cannot be compared with his invention, as the same is described in his patent. The consistency of Miles' claim appears from the text of his specification, the tenor of his contention in the interference proceedings and from his evidence, as given in the present suit. Thus, the patent starts out by saying that wire staples have been employed, but that they were driven into the wood with the penetrating points nearly at right angles to the surface; but such, he says, were liable to pull out by the weight. The problem before Miles was to drive a staple horizontally, and to prevent it being pulled out by a vertical pull. None of the references cited by the defence in this case as anticipating devices are staples that, if driven into a pail would resist the load. All would come out when the full pail was suspended from the handle; and so Miles went to work with his eye open, and that of his solicitor, to these older devices, and produced this double hook arrangement, which engages the wood by concave curves on each side of the pail, and holds it suspended in such a manner that a weak piece of wire will suffice to suspend the heaviest pail.

Mr. Serrell testifies that he was Miles' solicitor in applying for the patent, and that he was well acquainted with the state of the art at the time he framed the application. He says (page 106 of the Record):

"*I am also aware, and was aware before preparing the papers for said patent, that the penetrating points of staples had been formed in a variety of manners, among which I name the cutting of the wire diagonally, the diagonal cut generally being on the flat side of the staple.*

"*The said invention of Miles, as I understand it, therefore, does not relate broadly to all kinds of staples, nor to the simple cutting of a penetrating point diagonally; but the invention of the said Miles is clearly set forth in the patent, in the third paragraph*

thereof, and in the two claims, and from these I understand that Mr. Miles is the inventor—

"FIRST.—*Of a new article, consisting of a staple fastening for bails, made of wire, with* BOTH *points cut diagonally on the* UNDER SIDE, *so as to bend upwardly in the act of driving into the wood, thereby preventing the weight of the pail withdrawing the staple, so as to make better and more reliable articles than the staples that have before been made use of.*

"*In the staples before made use of there was no tendency for the ends to bend upwardly in the act of driving; hence, unless they passed entirely through the wood and the point turned over, they would easily pull out. By the improvement of Mr. Miles the diagonally-cut ends of the staples are bent upwardly and clinched, or anchored firmly into the wood by the simple act of driving, and hence are to that extent clinched, whether they pass through the wood or not.*

"SECOND.—*The improvement of the said Miles consisted in combining with the peculiar fastening staples before stated a metallic washer of a convex shape, which served to prevent the end of the bail from coming into contact with the surface of the pail and marring the same.*

"*I don't know of any instance where a washer has been combined with a staple and bail for a pail; but the second claim of the said reissued patent appears to be limited to the convex washer, in combination with the bail-fastening staple having upwardly penetrating points.*"

The court below, nevertheless, came to the conclusion that the first claim in the patent, in view of the fact that staples had previously been made with diagonally-cut points, whereby their curvature in the wood was effected, is not for an invention, but for a product which requires but ordinary mechanical knowledge to produce.

And as to the second claim, the court below arrives at the conclusion that although there never was in prior existence, as Mr. Serrell very truly says, any staple or bail-ear having a washer placed on this upper prong, yet the placing of such a washer did not produce a combination, but a mere aggregation, each part performing its own function without reference to the other, the washer not helping the bail-ear, and the bail-ear not helping the washer.

These conclusions being in our belief erroneous, this appeal was taken, and for our reasons of appeal we state the following:

ASSIGNMENT OF ERRORS.

FIRST.—The court below erred in failing to find invention

in the subject matter of the first claim of complainant's patent, in view of the state of the art.

SECOND.—The court below erred in finding that the second claim of complainant's patent is for a mere aggregation of parts, which have no common function.

ARGUMENT.

As to the first claim. It is, for the court as well as counsel, a matter of extreme difficulty, and always has been, to find the rule for determining the delicate question of invention, and drawing the line between mere ordinary mechanical skill and the genius of the inventor.

Authorities for and against locating this line in any one particular place can be found in almost all the books that contain decisions of the courts of the United States, respecting Letters Patent, but invariably the subject matter itself, its standing in the trade to which it pertains, the degree of the popularity which it had attained, or its failure to attain favorable standing in the market, and the character of the state of the art were important factors in guiding the courts to the conclusions at which they finally arrived. In one respect all authorities agree, namely, that to insure patentability, novelty and utility must both be present in the structure claimed. The absence of either of these qualifications will vitiate the patent. In the case at bar the rule of double use, on which the court below appears, at least to an extent, to have relied, does not come into play. It does not appear, as it did in the recent case of "Pearce *vs.* Mulford" (102 U. S., p. 112), that the feature claimed in the patent for one purpose had been used for other purposes in other branches of the art. In that decision the court says:

"*There certainly is nothing patentable in merely reducing the size of the bracelet, so as to adapt it to use in a necklace.*"

Clearly, if a staple having the general outline of that described in the patent, and having also the points arranged so that they should both bend in the same direction; that is to say, in the direction of the line drawn from one prong to the other, had been used for any purpose whatsoever before Miles' invention, his claim for applying such a staple to a pail would not be tenable. Nor would it be a good claim if there were a mere change of material involved, as in "Elastic Truss Co. *vs.* Page *et al.*" (Vol. 16, Official Gazette, 1045), where the invention rested merely in the degree of elasticity of a supporting band, and in the use of a pin and slotted plate fastening, which were old in such a relation. Nor, as in "Lorillard

et al. vs. Ridgway" (16 Official Gazette, page 1231), where the invention consisted in placing a piece of sheet-metal, having prongs, on a block of tobacco, it appearing that plates of sheet-metal having prongs were old.

If, therefore, either the use of the patented staple were shown to have been anticipated by analogous uses in other branches of mechanical pursuit, or if it had been shown that the patented staple had been previously made of other material merely, or that there was no utility in the form in which the inventor had clothed his structure, the first claim of the patent would clearly be void. But neither of these charges can be brought against the patent in suit. On the contrary, the utility of the invention is beyond doubt. The defendants admitted the excellence when they were first shown the staple, in the summer of 1873, and were then anxious to acquire an interest in the patent when granted. They admitted its excellence by buying the patented staples of the complainant, admitted it again by making a fac-similie thereof before this suit was brought, and a substantial embodiment thereof since the commencement of this suit.

Thus, Mr. Mann testifies, on pages 114 to 121 of the record, that between October, 1878, and October, 1879, within the space of twelve months, he had *sold* 7,438 pounds of the staples without washers, and 5,635 pounds of the staples with washers (p. 114), and had *used* on pails 1,700 pounds of the staples without washers, and 2,900 pounds of the staples with washers (p. 121), in all 17,673 pounds of staples. As about 150 of these go to a pound, the total manufacture by defendants in one year amounted to 2,650,950 staples, which answer for 1,325,475 pails. This being the manufacture in one year by a comparatively small concern, shows the invention to be of merit, even if the general admission of infringement would not estop the defendants from denying the utility of the invention.

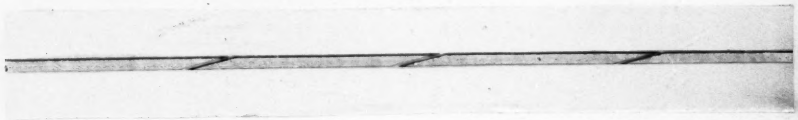
The court, in regarding the blind-staple like Boardman's, will remember that such are to be driven into the end of the wood, the prongs entering parallel with the grain of the wood, and that if such a staple, so adapted for a blind-slat, were driven into the side of a pail, where the grain of the wood runs lengthwise, up and down, it would necessarily tend to split the wood.

It involved, therefore, the exercise of inventive genius to adapt such a staple, not only to the direction in which the grain of the wood runs in a pail, but also to the direction of the strain which is afterwards brought to bear upon it.

Again, the older bail-ears of Walton, Krichbaum, and say also of Miller, although he does not antedate Miles, had their loops closed. In the Walton and Krichbaum structures the loops stood parallel to the pail, and hence these structures

could not, by driving them into a pail, make the connection between the pail and its bail.

The Miller bail-ear had a closed loop, as shown in his caveat and also in his reissue, so that it had to be joined to the bail *before being driven.* Hence, the bail-ears of Miller were not adapted to be sent out separately and used as separate contrivances in the manner in which Miles' bail-ears can be used. In Miles' structure, all parts co-operate to produce the result aimed at, and in making the Miles's device great economy is experienced, in that, from a straight piece of wire the sections for the respective staples can be cut off by parallel cuts, as shown in the accompanying sketch.



This will, when the wire is afterwards bent into form, give the result of having the two inclined faces on the lower sides of the respective prongs. That such is an important feature of the Miles' staple appears from Mr. Mann's testimony (see page 47 of the Record), from which the following is taken :

"Q. *Would not a staple, where both points were beveled on the outer side, hold stronger than complainant's staple, as shown in Exhibit C? A. Yes, sir; no doubt of it. We make them like Exhibit Mann. It would be more difficult to make the machine make them that way. I do not know that we could get the machine to make them. The process is all done in one motion. This is the way it comes out of the machine—just as I point my finger—a hundred in a minute. If we should want to have this on the other side, probably the wire would have to be turned; it would require a different motion.*"

It is ridiculous for Mr. Mann to say that the staple would hold as well if one of the prongs pointed downwardly in the wood instead of upwards, for it is clear, that when the pail is filled, its weight would readily cause such a prong to come out. There is, therefore, utility and novelty in the Miles device, for there never existed prior to his invention, a bail-ear so constructed that it would clinch itself in the wood, and so that when in the wood it would effectually resist strain in the direction *at right angles to that in which its prongs were driven,* all other staples, as is admitted by defendant's witnesses, Esch, Owens and Fisher, having been specifically made for the purpose of resisting strain in the same direction in which the prongs were driven.

In this connection we beg to refer to the following authori-

ties: Curtis' Law of Patents, 4th Edition, section 44. Here we find a quotation from a decision by Chief Justice Marshall, to the effect that it was not every change or form of proportion, which in a former statute was declared to be no discovery, but that which was *simply a change of form or proportion, and nothing more.*

"*If by changing the form and proportion a new effect is produced, there is not simply a change of form and proportion, but a change of principle also. The question will be, therefore, whether the change has produced a different effect. If the result of a change is beneficial in a considerable degree, its character will reflect back upon the change itself and aid in determining its extent.*"

See, also, Curtis, section 47, where it is stated that "if the result at which the inventor had arrived was new, there was a sufficiency of invention without looking at the apparent facility or difficulty of accomplishing it."

See also Curtis, Section 56, where the following is found: "When, therefore, the principle is well-known, or the application consists in the use of a known thing to produce a particular effect, the question will arise whether the effect is of itself entirely new, or whether the occasion only upon which the particular effect is produced is new. If the occasion only is new, then the use to which the thing is applied is simply analogous to what had been done before. But if the effect itself is new, then there are no known analogous uses of the same thing, and the process may constitute such an art as will be the subject of a patent. * * * Of course, if any new contrivances, combinations or arrangements are made use of, although the principal agents employed are well-known, those contrivances, combinations or arrangements may constitute a new principle, and then the application or practice will necessarily be new also."

This court, in "Dunbar *vs.* Myers" (94 U. S., p. 187), in analyzing "invention" as the same had been defined in former decisions, such as "Collar Co. *vs.* Van Dusen" (23 Wallace, 563), "Hotchiss *vs.* Greenwood" (11 Howard, 267), "Phillips *vs.* Page" (24 Howard, 167), "Jones *vs.* Morehead" (1 Wallace, 162), "Stimpson *vs.* Woodman" (10 Wallace, 121), "Hicks *vs.* Kelsey" (18 Wallace, 670), and "Brown *vs.* Piper" (91 U. S., 38), said (p. 199) that

"*It is settled law, that a mere carrying forward of an original patented conception, involving only change of form, proportions, or degree, or the substitution of equivalents, doing the same thing as the original invention by substantially the same means, is not such*

an invention as will sustain a patent, even though the changes of the kind may produce better results," and that "*an applicant for a patent is not entitled to the public protection, unless the supposed improvement involves actual invention or discovery.*"

Applying this dictum to the present case, it follows that if Miles merely changed the position of a diagonal cut without obtaining a new result, or without, by so doing, adapting a known contrivance to an entirely new purpose and use, the complainant's patent would be void. But, if on the other hand, such a departure from the old constructions should be found as will not only produce a new result, but also a practically new machine or contrivance, then the patent would seem to deserve the support of this court.

In "Seymour *vs.* Osborne" (11 Wallace, 516), speaking on the same subject this court said (p. 548) that a patentable

"*Change in an old machine may consist merely of a new and useful combination of the several parts of which the old machine is composed, or it may consist of a material alteration or modification of one or more of the several devices which enter into its construction, and whether it be the one or the other, if the change of construction and operation actually adapts the machine to a new and valuable use, not known before, and it actually produces a new and useful result, then a patent may be granted for the same, and it will be upheld as a patentable improvement.*"

In "Bruce *vs.* Marder and *al.*" (22d Official Gaz. Patent Office, page 1039), Judge Wheeler in a case where it appeared that an invention, which on its face seemed but slim, had been of great utility, and gone largely into use, held that :

"*This shows that he (the patentee) discovered and put to use what others skilled in the art had overlooked, that it was very desirable when known, and would very probably have been found out before, if ordinary skill in that art could have discovered it.*"

If that is the rule, the court cannot fail to find the exercise of inventive genius in a case, in which a substantial departure from any previous form or construction is shown, a new adaptation of known principles to a new purpose devised, and the immediate acknowledgment of the superiority of the invention by the defendants themselves proven.

In "Washburn & Moen Manufacturing Co. *vs.* Haisch," (Vol. 19, Official Gaz., page 173), the Circuit Court, speaking through Judges Drummond and Blodgett, investigated this

question of invention with the utmost care. In fact, we believe that in this opinion the latest treatise, and one of the most exhaustive on the question of invention, can be found. The court there, quoting from decisions of this court and of the Circuit Courts, to show the general drift of opinions on the question of infringement, finally says (p 174):

"*The most that can be said of these old devices as applicable to these patents, is, that they narrow the field for the exercise of inventive faculty, and limit the range of the patents.*

"*In this connection, it is proper to consider briefly the objection that these devices are not patentable, from the fact that, in view of what was well known in the same direction, it did not require inventive genius to make any of the devices involved in these patents, but that only mechanical skill was requisite to adapt old devices to this new use. There is no doubt that a device, in order to be patentable, must be the result of invention. The mere mechanical adaptation of old things to new uses is not usually invention, unless in combination; and yet it is extremely difficult in many cases to say just where the inventive faculty asserts itself as the controlling force. And the authorities furnish us no satisfactory test to apply and determine this question. Although there is usually little difficulty in determining as a matter of fact, in each case, whether a device is or is not in some degree the result of invention, if there is any invention required, then the law will not attempt to measure its extent or degree. * * * * In the absence of any other test, the courts have seemed to assume that the fact of the acceptance of a new device or combination by the public, and putting it into extensive use, was evidence that it was the product of invention; or, as one of the counsel for plaintiff expressed it, 'utility is suggestive of originality.' * * * * * **

"*Tested by the rule of utility here suggested, this record abundantly shows that the device in question has been accepted by the public to an extent which has hardly heretofore followed the most successful inventions. Its utility must be considered as a conceded fact.*"

In "Hoe *vs.* Cottrell" (17 Blatchford, 546), Judge Shipman, speaking on the same subject says (page 552):

"*In the determination of the question whether there was invention in any particular combination, the important point is to ascertain whether novelty and utility existed. It is true that these requisites may result from mere mechanical skill, and a new and useful combination may be formed by the mere mechanical addition of an old member to an old set of members; but when a device has a new mode of operation, which accomplishes beneficial results, 'courts look with favor upon it,' and are not exacting as to the de-*

gree of inventive skill which was required to produce the new result; there must be some, but a little will suffice."

Justice Blatchford in "Wooster *vs.* Blake and others" (22d Official Gaz., Patent Office, page 1132) says:

(p. 1133). "*In regard to claim one and other features in the patent, much is said in the evidence on the part of the defendants as to the obvious character of this or that arrangement, and that any mechanic would know enough to do this or that. This is the often-repeated story in belittling inventions. The invention consists primarily in finding out what mechanical operation is necessary to produce the practical result arrived at. When such operation is hit upon, the mechanical work is easy. It is easy when the mechanical operation is seen, to say that it was obvious that certain mechanical arrangements would effect it; but mechanical arrangements are tried and tried in vain, to reach a practical result, because the mechanical operation, which is to effect such result, is not yet seen. In looking at the completed thing, the mechanical operation is there, but the inventor, though he knew all about cams and levers, and other mechanical arrangements, did not have in advance before him the coveted mechanical operation.*"

In "Dederick *vs.* Cassell" (Vol. 20, Official Gaz., page 1233), the Circuit Court, speaking through Judge Butler (p. 1234) said:

"*It will not answer to say, this required no invention, that any mechanic might have selected the parts and combined them. The same might be said with equal force in almost every instance, in which a patent for a combination is issued. The fact that no mechanic did select and combine the parts, and produce such a press, notwithstanding the great need for it, is a sufficient answer to the suggestion.*"

We have, we believe, shown that the preponderance of the authorities is in favor of allowing the complainant the enjoyment of his patent, so far as the first claim is concerned, it appearing that the same structure had not previously been made, that none of the prior structures, which are referred to in the defendant's record, were adapted to the uses to which the patented invention is put, and that the invention has gone into general use, in the very form, in which the original inventor had first put it.

As to the Second Claim.—The court below concedes, it appears, the novelty of the combination or arrangement of parts, which is sought to be covered by this second claim, but sees in the grouping together of the elements of this claim no unity

of function, and, therefore, regards the claim as being for a mere aggregation. If there is no unity of function, that ruling is necessarily correct; but if there is even a doubt on that subject, that doubt should, we submit, be resolved in favor of the patent.

The attention of the court is once more invited to an inspection of the patented structure, and to the fact that the loop, into which the bail hooks, is open on the inner side, the top of the loop being a mere prolongation of the upper prong. On this top bar the bail rides, so to speak, and if we take the patented staple, without the washer, considering that the washer does not help in the operation, we will at once perceive that the bail has a certain amount of play in this open loop and on this top bar, which is, undoubtedly objectionable in a properly constructed handle-connection. The bail is usually of semi-circular form. While the pail is empty there is substantially no strain on the bail, but fill it with water and lift it, and immediately the bail will be strained longitudinally, and will receive a tendency to hug the pail more closely; hence, where such a play is admitted, the bail would slide on the upper prong as the heavy pail is lifted, and would thereby be unduly strained, and also would unduly strain, by the gradual displacement, the upper portion of the staple. If the court will look once more at the Miller contrivance, it will see that Miller sought to guard against this play *by closing the loop*, and not leaving it open as Miles does. In this closed loop of Miller the bail could not slide, but the objection to this construction is, as has already been intimated, that such a closed loop would require the staple to be connected to the bail before it is fastened to the pail, and would, in fact, exclude the putting together in any shop of the three parts, pail, staple and bail, as they are received from the several makers, without any previous change in the form of either. Hence, especially on pails that have inclined sides, and in which the outwardly projecting loop on the staple is necessary to bring such loop vertically under the ends of the bail, the washer is of real importance, in preventing the springing action of the bail or handle and the consequent annoyances that would result therefrom.

Thus, Mann himself, one of the defendants, on page 116 of the Record, speaking of this washer, says:

"*The utility cannot count for anything. As the bail on a painted pail works, the pressure comes* OUTWARD AWAY FROM THE WOOD.

"*Q. The curve of the bail springs?* *A.* SPRINGS OUTWARD AWAY FROM THE PAIL."

What Mr. Mann means is, that when the pail is allowed to stand on the floor, the bail will have a tendency to spring *out*,

but it takes no witness to convince this court, that when that pail is filled with water, and then lifted by its handle, the ends of the bail will contract and the bail will bear tightly against the sides of the pail. Here the washer becomes operative in properly locating the bail in the loop and preventing it from swinging laterally thereon. In other words, the washer produces such a *closed* loop as Miller does, without the disadvantages that follow the closing of the loop *before the staple is fastened to the pail.* If the court will examine the drawing of the Miles patent, it will see that the bail has no play, although it is put in the open loop; and if it will examine "Exhibit Stoffel A," it will find the same fact. Clearly, therefore, the washer helps the staple in the performance of the duties that pertain to the staple, while on the other side, the staple helps the washer by holding it in place. Were it not for combining the two, as they are shown combined, if there should be a necessity for a washer, it would have to be attached by separate fastenings. Being attached by the staple, and helping to close the loop of the staple, as it does, there is clearly sufficient co-operation to authorize the court in sustaining this second claim, especially as against a defendant, in whose mouth it does not seem to lie to belittle the claim of the patentee whose invention he has sought to abstract without recompense.

This second claim is not a claim like that referred to in the opinion of the court below, for a tool-chest, or feed-box, attached to a harvester, and is indeed a better claim than that for the combination of knives and rake and binders in one structure, which, in the case of "Gedder *vs.* Copeland," to which the court below refers, was pronounced a good claim for a combination. Much importance seems to have been given by the court below to the decision of the Circuit Court in "Webster Loom Co. *vs.* Higgins" (15 Blatchford, 446), which was cited in defendant's brief, and where the court, speaking through Judge Wheeler, said (p. 455), that "there can be no invention about the combination of a lay in a loom with a rigid shuttle box and with the parts of a wire motion, because the functions of the lay are to carry the reed and shuttle boxes, and to serve as a shuttle race, without having anything to do with the wire motion."

But this court in reviewing that same case (105 U. S., 589, 591) overruled the Circuit Court, and found that the elements in question did enter into combination, making use, in that connection, of the following language:

"*Now, that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit. It may be laid down as a general*

rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention."

In addition, the second claim of the patent ought to be regarded in this light: Granted, that Miles was the first to produce any staple in which the prongs were both adapted to curve upwards, when driven, it was left for him to choose whether for the inner bearing of the bail he should provide that staple with a fixed shoulder, or with a movable, detachable shoulder. He found the latter to be the most advantageous, as it allowed the employment of a bail having a closed eye, and its proper connection to the pail by the mere driving of the staple. Hence, he found, that one feature of his invention consisted in providing his two-pronged, upwardly-inclining staple with a loose shoulder instead of a fast one, *some inner bearing for the bail being invariably necessary*, and having always been provided by the anteceding inventors, as the court will find upon examination of the several patents for pail connections.

Looked at in that light the case is fully disconnected from "Hailes *vs.* Van Wormer" (20 Wallace, 353), where a flaring fire-pot, a magazine, certain flues, draft passages, exterior openings and mica windows in a stove were claimed as a new combination, and where the court held that they were a mere aggregation of devices, and not invention, because all the elements being old, each was allowed to work out its own effect, without producing a new and useful result by the joint product.

In the appellant's patent all the elements of the combination are not old. Washers are old, but the staple is new, and anything that is added to the staple to enhance its value for the purpose for which it is intended, is properly claimed by the originator.

In view of these considerations, it is believed that the appellant's patent is good and valid, and this being the only question before this court, it is prayed, that the decree below be reversed and an order entered, requiring the defendants to account for their infringement of said patent.

Respectfully submitted,

A. v. Briesen,
Attorney for the Appellant,
229 Broadway, New York.

October 2, 1883.

109-117

OFFICE SUPREME COURT U. S.
FILED
OCT 15 1883
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

THE DOUBLE-POINTED TACK COMPANY,

APPELLANT,

vs.

THE TWO RIVERS MANUFACTURING COMPANY, JOSEPH MANN AND HENRY MANN,

APPELLEES.

APPELLEES' BRIEF.

WM. P. LYNDE, *Counsel.*

CRAMER, AIKENS & CRAMER, PRINTERS.

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APPELLEES' BRIEF.

The Court below decided that both claims in the patent sued upon are invalid. The first claim, because it contains no patentable invention. The second claim, because it contains merely an aggregation of parts which have no common function, and also, because it contains no patentable invention.

The opinion of his Honor, Judge Dyer, will be found on pages 124–131 of the printed case.

The first claim of complainants' patent, found on page 22 of the printed case, is as follows:

"*I claim as my invention—1st, The compound staple-fastening* d *for bails made with the diagonally-cut penetrating points* 2 *and* 3, *and loop* 4 *and body* 5, *said diagonally-cut points being positioned as set forth, so as to bend upwardly in driving into the wood, as set forth.*"

This patent was issued Feb. 10th, 1874; the application was filed Nov. 11th, 1873. Long prior to this time, wire bail ears had been patented and were in public use in this country. Jonathan Walton, of Brooklyn, N. Y., obtained a patent for a wire bail ear, dated May 12th, 1868, and numbered 77,853. J. C. Krichbaum, of Ohio, obtained a patent for a wire bail ear, dated May 4th, 1869, No. 89,666, and was manufacturing and selling them in large quantities.

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We also have the bail ear of William Collins, on which he filed an application for a patent Feb. 29th, 1868, a copy of which is made a part of the evidence in this case. We call the attention of the Court to this bail ear of Collins'; its similarity to complainant's bail ear is very striking. It has the diagonally-cut penetrating points, the loop, the body, and the only difference would seem to be, that in Collins' staple, the points are cut diagonally, one on the upper, and the other on the lower side. We are not aware that any difficulty was ever experienced from the staple drawing out by reason of the penetrating points being cut in that way. Mann, in his testimony, folio 171, says: "If both points of the staple are beveled on the outer side, the tendency of the staple, when driven into the wood, would be in the same direction as the bevel, both points would come together—converge together. If the points converge together it would hold stronger than if both were curved in parallel lines. There is no doubt that a staple, when both points are beveled on the outer side, would hold stronger than complainant's staple, as shown in "Exhibit C."

We give a drawing of the Collins staple.

It will be noticed that the lower penetrating point is cut diagonally on the lower side, the upper point is cut diagonally on the upper side. Complainant's patent claims that he has invented the cutting the upper penetrating point on the lower side as well as the lower point. Collins' staple the lower point would assume an upward inclination in driving it into the wood, and it was no invention or discovery of either Miles or Collins that this would be the effect of the diagonal cut on the lower side. Now to make both points just alike, and get the upward inclination of both points as Collins had of one; and avail himself of a common well-known principle that the resistance caused by the bevel when the point was driven into the wood, would force the point off in the direction of the bevel; hardly requires the skill of a mechanic.

Dunbar vs. Myers, 94 U. S. R., 195.

It is also shown by the evidence that Alfred Miller of Ohio, filed his caveat in the patent office on the 23d of August, 1873, for a wire bail ear, and that on the 14th day of April, 1874, a patent was issued to Charles H. Waters & Co., assignees of Alfred Miller, No. 140,594, and that on an interference with Miles, the Commissioner of Patents decided the priority of invention in favor of Miller.

This resume brings before us the state of the art at the time Purches Miles claims to have invented complainant's bail ear.

Complainant produces Lemuel W. Serrell as an expert. He says on p. 106: "I procured the said letters patent for said Miles, and I fully understand the same. I am well acquainted with the state of the art in relation to bail ears, and that knowledge has been derived, not only from communications with the inventor, but from extensive examinations which were connected with inter-

ference proceedings in the Patent Office. In the said letters patent of complainant, the second paragraph makes a very broad admission, to the effect that wire staples have been used for fastening the eyes of bails of pails, and that these staples have been driven into the wood with the penetrating points nearly at right angles to the surface. I am also aware and was aware before preparing the papers for said patent, that the penetrating points of staples had been formed in a variety of manners, among which I name, *the cutting of the wire diagonally*, the diagonal cut generally being on the flat side of the staple."

We think this expert must be mistaken about the diagonal cut on these wire bail ears being upon the flat side of the staple; for the reason that in driving the staple into place, it would have a tendency to split the wood. But suppose it to be true that the wire staple he was aware of was generally cut diagonally on the flat side of the staple, and Mr. Miles concluded to cut them on the lower side of each point, is there any invention in that? Suppose that cutting the points on the lower side, made the points when driven incline upwards, is there anything new in that? Suppose the bail ear, when the points are inclined upwards, hold stronger than when they incline in any other direction, is there any novelty in that? It would seem that these questions should not require a professional expert, anxious to sustain a patent gotten out by himself to answer.

This expert further testifies: "The said invention of Miles, as I understand it, therefore, does not relate broadly to all kinds of staples, nor to the simple cutting of a penetrating point diagonally, but the invention of the said Miles is clearly set forth in the patent in the third paragraph thereof, and in the two claims, and from these I understand Mr. Miles is the inventor:

First. Of a new article consisting of a staple fastening for bails, made of wire, with *both* points cut diagonally on the *under side*, so as to bend upwardly in the act of driving into the wood, thereby preventing the weight of the pail withdrawing the staple, so as to make better and more reliable articles than the staples that have before been made use of." Now, all this proposition amounts to is, that Miles cut both points diagonally on the under side; Collins cut one diagonally on the lower side, and the other diagonally on the upper side. This expert further says: "In the staples before made use of there was no tendency for the ends to bend upwardly in the act of driving; hence, unless they passed entirely through the wood and the points turned over, they would easily pull out." As to the first part of this proposition, it is not true, for Miles has produced witnesses and proved in his interference with Miller, that the Collins staple had been manufactured and sold, and publicly used, and his staple had the diagonal cut on the under side of the lower point, as appears in his application

for a patent, and by a never-failing law of mechanics, such diagonal cut did have a tendency to bend the point upwardly in the act of driving. This witness further says, by the improvement of Mr. Miles "the diagonally cut ends of the staples are bent upwardly and clinched, or anchored firmly in the wood by the simple act of driving, and hence are to that extent clinched, whether they pass through the wood or not." In this sentence this expert wishes to be understood that complainant's staple produced a new effect, in that it was more firmly anchored in the wood, and partially clinched by driving, that is, the curve or bend caused by driving served as a clinch, although the points did not pass through the wood. Now, this witness is familiarly acquainted with the Collins staple. He was counsel for Miles in the interference case, in which the testimony was taken as to the Collins staple, and it is perfectly apparent that the Collins staple, with the diagonal cut on the under side of the lower point, and the upper side of the upper point, when driven, will anchor the points in the wood, and hold with a much firmer grip than the Miles staple. One look at the drawing shows that the Collins staple cannot come out without taking out a piece of the wood. See deposition of Joseph Money, fol. 72. Henry Mann's deposition, fol. 86 and 87.

It is common knowledge that the diagonal cut of penetrating points, when driven into wood or any substance that is hard enough to resist the entrance of the point, will cause the points to vary from a straight line and fall off more or less, according to the stiffness of the wire and the extent and angle of the surface of the diagonal cut, and the resistance of the material. It may be upward, or it may be downward, or in any other direction, depending entirely upon the position of the diagonal cut point as it is driven into the wood or other substance, if it is stiff enough and sharp enough to penetrate the substance. Drive complainant's staple into the pail, point No. 2 below and point No. 3 above, the diagonal cut will cause the points to incline downwards instead of upwards. The fact of the diagonal cut being on the under side depends entirely upon the position of the staple when driven; there is no under or upper side to the point of the staple, except as the staple is placed at the time. The patentee says in his specification: "My invention consists in a bail fastening staple made of wire, with the penetrating ends cut at such an angle that in driving them into the wood they will assume an upward inclination." This is easily understood. It is common knowledge just how the penetrating ends must be cut to produce this result.

The patentee treats it as common knowledge, when he describes his invention by the result accomplished, instead of describing the manner in which it is accomplished. What, then, has he invented; not the staple with the diagonal cut; not the

staple with the diagonal cut on the same side of both points; not the inclination upwards or downwards, or in any other direction, when the points are driven into the wood or other substance. This all follows a never-failing law of mechanics, which has been known and practiced as long as we have had mechanics.

The claim is for a compound staple. It becomes important, therefore, to ascertain just what this compound consists of. That is, the ingredient of which it is made; for if we do not use the same compound, if some of the ingredients which are described in the specifications, and claimed as important, are entirely omitted in the staple we have manufactured, then, by the well settled rule of law, we have not infringed complainant's patent. This claim reads: 1. "The *compound staple-fastening* d for bails made with the diagonally-cut penetrating points 2 and 3, loop 4 and body 5; said diagonally-cut points *being positioned*, as set forth, so as to bend upwardly in driving into the wood, as set forth." Here is no claim for a new article consisting of a staple fastening for bails, made of wire, with both points cut diagonally on the under side, as the expert would have us believe. There is not a word in this claim about the staple being made of wire. Not a word about both points being cut diagonally on the under side; but it is claimed that said diagonal-cut points shall *be positioned* as set forth; that is, that the points, after they have been cut, shall be placed in a certain position. Now, these points could be made to occupy the same position whether they were cut upon the one side or the other. But these points must be placed in such a position that they will bend upwardly in driving into the wood. We all know, to accomplish this purpose, we must place the staple in a position that the cut will be upon the lower side of the penetrating points. This bend caused by the diagonal cut of the ends of the points is very slight; it is scarcely perceptible, and I do not believe has any effect whatever, making more firm the hold of the staple in its place. This is not the main ingredient upon which the patentee relies. He says: "The points of the staple penetrate the wood upwardly, so as to effectually prevent the staple pulling out under the ordinary strain to which it is subjected. Now, by an examination of the drawing, Figure 2, we are informed just what this staple is. Its points have an inclination of twenty-five to thirty degrees before they are driven at all. It is evident that this inclination of the points, as it was manufactured, and before driven, is the principal ingredient in the compound which the complainant claims by his patent: it is by reason of this that the weight will tend to force such points inwardly, rather than to draw them out."

From this drawing, it appears that a perpendicular line drawn through both points would form an acute angle on one side of the line, and an obtuse angle upon the other.

That this is an important part of the complainant's compound staple, is evident from both the specification and the claim, Sec. 4889 of R. S. of U. S. provides: "When the nature of the case admits of drawings, the applicant shall furnish one copy signed by the inventor or his attorney in fact, and attested by two witnesses, which shall be filed in the patent office; and a copy of the drawing to be furnished by the patent office, shall be attached to the patent as a part of the specification." We have here the true meaning of the words in the claim, "said diagonal cut points being positioned as set forth." It is in fact the position of these diagonal cut points that constitutes the material part of this claim. Complainant's counsel in the examination of the witnesses, makes this an important point of difference between complainant's staple and the staples which defendants produce and make Exhibits to show prior use. He makes John Esch say in cross-examination (folio 47), which is put here in narrative form: "There is this further difference in the two staples (speaking of defendant's Exhibit A and complainant's staple), the lower bend in the staple on the circular Exhibit is bent at an acute angle, and the upper bend is at an obtuse angle as it appears on the paper." In the cross-examination of Edward Owens (folio 57 and 58), the counsel asks the witness: "Now I call your attention to some other points of difference; is it not true that there is a difference between the two staples in this, that in complainant's drawings, the angle on the upper part is an obtuse angle, and the lower bend is an acute angle, which does not appear in defendant's 'Exhibit A?'"

A. This has a slant, and that seems to be tapering from both sides; I don't see much difference with respect to the angles where it begins to bevel. The angle on complainant's drawings at the upper end seems to be more obtuse than it is at the lower end.

We have never manufactured, used, or sold any such staples. Henry Mann in his deposition says (folio 84): "The staples that we manufacture of this kind here, (which is offered in evidence and marked "Exhibit Mann Bros." P. W.) are intended to run on a square; they are on a true angle, while the Double-Pointed Tack Co's have an acute angle on one and the reverse on the other. I mean by true angle, a square, horizontal angle; I mean that in the staple that we manufactured, the lower point was at right angles to the body of the staple. We never manufactured a staple where the lower point made an acute angle with the body of the staple, nor used any in that shape, except such as we bought of the complainant."

Q. Now, Mr. Mann, I wish you would state what difference in form there was between the staple you manufactured and the staple you bought of the complainant, and which you used previ-

ous to October; what was the difference in form between the two staples?

A. The staple of the Double-Pointed Tack Co., the lower prong runs at an acute angle from the body of the staple, while the longer point runs on an obtuse angle, while our staple is intended to run on a square from the body, and the two points run parallel to each other and at right angles to the staple. Now I would explain here that there was no purpose in doing that; our machine made them in that way; never thought of it. * * * Horseshoe nails are beveled, so that the nail will be driven outward, out in the hoof at a certain point, I mean turned out. That is not a new thing; that is nothing new; it has been done as long as horses have been shod I expect. The effect of the bevel in the chisel in carpenter work is, that if you drive a chisel into the wood it will drive outward from the bevel or in the same direction as the bevel. If both points of the staple are beveled on the outer side, the tendency of the staple, when driven into the wood, would be in the same direction as the bevel, both points would come together; if the points converge together it would hold stronger than if both were curved in parallel lines. There is no doubt that a staple, when both points are beveled on the outer side, would hold stronger than complainant's staple, as shown in "Exhibit C."

Defendants have set up in their answer and introduced in evidence a staple substantially the same as complainant's staple. It is marked defendants' "Exhibit A." John Esch testifies (folio 44): It is used upon the wagon thill, "to hold the saddle-strap and prevent its slipping back, and to hold the wagon in going down hill. The same form of staple is used for the back breeching strap; used to fasten the back breeching strap. When used to hold the back breeching strap, it is put through the staple. This form of staple has been in common use for lumber one-horse wagons ever since I have been wagon making down to the present time. A staple, similar in form, is used frequently to hold the hammer strap in two-horse wagons. This old staple, used upon the wagon thill, is similar in shape to complainant's "Exhibit C," * *. I have known a staple similar to complainant's, being used for other purposes than in and about wagons. I have got an idea I made similar staples, the same form for harnesses." John Esch is a wagon maker, and until the counsel for complainant called his attention to the diagonal cut of the points of his staple, he had believed the staples just alike. The shape was the same, and they were both used for the same purpose, that is, they were both intended to support a weight or force applied at right angles, or nearly at right angles, to the points of the staples. We call the attention of the court to "Defendants' Exhibit A," and the similarity between it and complainant's staple. When the points are buried in the wood, the appearance of the staples is

identical. Edward E. Owen, a machinist, is shown drawings of complainant's patent, said (folio 51): "I have seen similar staples used for other purposes; never noticed it on pails. They have been using something similar for wagon tongues as far back as twenty years ago—perhaps more. I helped make them when I was an apprentice; they were used for wagon tongues; they were to go on to the end of the tongue; the function they performed was to keep the tongue from slipping through the neck yoke; Defendant's "Exhibit A" is a good deal the same; that has a little more curve to it. Is shown Ex. C, and witness is asked if he ever saw that before; answers: Well, yes, I have seen a good many, and helped make a good many; these are about the same as defendant's "Exhibit A;" all the difference is, that is made of half-round iron, and this is made of round iron; that is all the difference; there is a little difference in shape; the difference in shape is, that is turned sharper here, and that is about all; there is a sharper turn to the loop of the lower end, and the body is straighter from the curve; I don't remember about this staple, when I first saw it; we had quite a number around the shop; I think I have seen it before; I didn't take it out myself, probably some of my men did. I have a good many around there now; I got one around there, I think, made in Racine about twenty years ago, taken from a threshing machine; don't remember seeing this before until after it was taken out; I may have seen it in the wood. Staples like defendant's "Exhibit C" (?) have been in use as long as I have been acquainted with the trade; in very common use; they have been used for threshing machines, and also wagons; they are very common on threshing machines. There is a loop which comes down from the decking and loops in the upper angle of the staple. We use six on each side of the machine; have used them for a long time; they have been used as far back as eighteen years, anyhow, on threshing machines; don't know but longer; remember putting them on when I was an apprentice; there is one thing with these staples, they were of smaller iron; of one-eighth wire or wrought iron. What we use for decking is smaller than this; what we use on wagons is still larger than defendant's "Exhibit A." I cannot see much difference between "Exhibit C" and the drawings of complainant's patent, Exhibit A, only this. If I understand right, we make our points more regular, tapering, and this is slanting, what I call beveled. I mean the bevel at the points on the inclination of the points, just from here out; simply that. The heavier ones for wagon tongues were hammered out; we hammered the points right out sharp, something like "Exhibit C," and those for threshing machines we took a large lever shears and cut this bevel on it, in the place of hammering it, it is so much quicker; we do it the same time we cut the iron for the ring. The points

of the staples we use in threshing machines are cut diagonally; they are cut tapering with shears; for instance, we take a wire and cut it slanting, so, and turn this for the staple and use this end, and that forms a point on each end of the staple, and we take and bend them afterwards. As long as I can remember, I have known the points of these staples, used in threshing machines, to be cut in that way, the smaller ones; the bigger ones we hammered out. *Q.* Are these points both of them cut on the same side; how did you cut them, on the upper side, or lower side, or sideways? *A.* We cut the wire diagonally so as to form a sharp point; we were not particular as to which side of the point is beveled, the object being to get a sharp point; sometimes the bevel is on the lower side and sometimes on the upper, and sometimes on different sides of the two points.

William Willer, am sash and door manufacturer. Witness is shown complainant's "Exhibit C," and he says: I used some of these staples; we make them ourselves for ventilation blinds, and sometimes I have bought staples in the store that were cut off like these. They use them in gas works for ventilation in the roof, and some for breweries, houses, etc. The points were cut diagonally in that way, by what machine I do not know; some were made flat this way for blind staples, about 18 or 20 years ago. * * * *

Cross examination, fol. 70. *Q.* "State, Mr. Willer, whether you ever before saw a double pointed tack or staple, with the bevel cut out on the same side of both points as this is? *A.* Well, what they have for wire fences, what they call wire fence staples, are cut just diagonally, too.

Joseph Fisher: My business is saddlery-hardware. Witness is shown complainant's "Exhibit C," and asked to state whether he has ever seen a staple similar in form to that, used for any purpose. To which he answers, I have seen a staple of a form similar to this, on a large scale; in one instance I have seen it used on thills, like defendants' Exhibit A. I have seen it used, I think when I first came to this country 32 years ago. I think the first year I was here. I have seen them used for over ten years back; I think they are now out of date. I have seen them used on hames, wooden hames; I think we have one in our store now. They are little used now. (Hame shown witness.) This is the same kind I saw used 25 years ago; I cannot tell exactly, but I don't think it would be far from 25 years; they have been used in harness; they may have been used for some years more. I should think that the staple used on the hames was about the same thing as complainant's Exhibit; the same principle; I have seen them used in Milwaukee." * * * * *

As to the similarity of the staple used on the thill of a wagon,

we have the deposition of John Esch, Edward E. Owens and Joseph Fisher.

As to the similarity of the staple used on the threshing machine, Edward E. Owens, folio 51, 52; as to the similarity of staples used upon ventilation blinds, William Willer, folio 66, 67.

Staples used for wire fences, folio 70.

Similarity of staples used on wood hames, Joseph Fisher, folios 74, 75.

These are staples substantially the same as complainant's staple, but used for other purposes than bail ears. But the purpose for which a thing is used is not the subject of a patent.

"A machine, or apparatus, or other mechanical contrivance, in order to give the party a claim to a patent therefor, must in itself be substantially new. If it is old and well-known, and applied only to a new purpose, that does not make it patentable. A coffee-mill applied for the first time to grind oats or corn or mustard, would not give a title to a patent for the machine. In short, the machine must be new, not merely the purpose to which it is applied. *A purpose* is not patentable; but the machinery, *only*, if new, by which it is to be accomplished. In other words, the thing itself which is patented must be new, and not the mere application of it to a new purpose or object." Bump's Law of Patents, 45. Bean vs. Smallwood, 2 Story, 412. Tucker vs. Spaulding, 13 Wall, 453. Smith vs. Elliott, 9 Blatchf., 400. Brown vs. Hall, 6 Blatchf., 401. Roberts vs. Ryer, 91 U. S. R., 150.

It cannot be claimed the staples are not substantially in the same form. But it will be insisted that there is one substantial difference, and that consists in the diagonal cut on the lower side of both the points of complainant's staple, for the purpose of causing the points to incline upward while being driven into the wood.

Now, the testimony of almost all the witnesses, that it was common knowledge that, by cutting the points diagonally, you could give to the point such inclination as you wished, shows that there was no invention in giving this cut to the point. In Dunbar vs. Myers, 4 Otto, 197, the Court say: "Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent; and it was decided by this Court, more than a quarter of a century ago, *that unless more ingenuity and skill were required in making or applying* the said improvement than are professed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention. Hotchkiss vs. Greenwood, 11 How., 267."

"Ten years later, a case came before this Court, in which the plaintiff claimed certain improvements in the construction of a machine for sawing lumber with the circular-saw, including the

manner of affixing and guiding the saw, by allowing end play to its shaft, in combination with the means of guiding the device by friction rollers and other appliances. Mills for sawing logs with a circular-saw had been well-known long before the supposed invention; and in construing the claim of the patent, this Court said that the claim is for the precise organization of the old machine, namely, the manner of affixing and guiding the circular saw by allowing end play to its shaft, in combination with the means of guiding it, by friction rollers, so as to have the centre entirely unchecked, adding, that there is nothing new in the combination, and assigning as the reason for the conclusion, that the improvement had long been known and used in the circular saw for sawing timber of smaller dimensions than ordinary saw logs. Enough appears to show that the machine in that case was larger than those of the kind which had preceded it; but the Court remarked that that circumstance did not afford any ground in the sense of the patent law for a patent, for the reason that the ordinary mechanic was doing the same thing every day in making a working machine from the patent model."

"In order to reach invention," say the Court in that case, "the patentee must carry his improvement further; he must contrive the means of adapting the enlarged old organization to the new use, namely, the sawing of saw logs, and claim, not the old parts, but the new devices by which he has produced the new result. Phillips vs. Page, 24 How., 167. Decisions by this Court of later date have been made to the same effect; as, for example, the Court decided that the claim of the patentee for making the cases of door locks and latches double faced, or so finished that either side of the case may be used for the outside, in order that the same lock or cased fastening may answer for a right or left house door, was void, because the patentee did not show that he was the original and first inventor of the improvement, and intimated very strongly that the making of such a case, with two faces just alike, and so finished off in point of style that either side was fit to be presented outward, was not a matter which could be patented, even if no locks with such cases had ever before been made."

Stimpson vs. Woodman, 1 Wall, 162.

"Patented improvements which are not new and useful, *or which did not require any* invention or discovery to make the same, as compared with what existed or was in use before, may be declared invalid by the Court in an equity suit. *Stimpson vs. Woodman*, 10 Wall, 117. Mere change in a machine of one material for another, as wood, or wood strengthened with iron for iron alone, is not invention in the sense of the Patent Act, and therefore is not the subject of a patent." *Hicks vs. Kelsey*, 18 Wall, 670.

Old processes are sometimes applied to new subjects, and when that was so, in a case which did not require the exercise of the in-

ventive faculty, and without the development of any idea which could be deemed new or original in the sense of the patent law, it was held that the supposed improvement was not the subject of a patent, and that Courts of justice may take judicial notice of a thing in the common knowledge and use of the people throughout the country. Brown vs. Piper, 91 U. S., 38.

"Proof of the state of the art is admissible in equity cases, without any averment in the answer touching the subject, and in actions at law, without giving the notice required when evidence is offered to invalidate the patent. It consists of proof of what was old and in general use at the time of the alleged invention; and may be admitted to show what was then old, or to distinguish what is new, or to aid the Court in the construction of the patent. Meritorious inventors are entitled to protection; but it is settled law that a mere carrying forward of an original patented conception, involving only change of form, proportions or degree, or the substitution of equivalents, doing the same thing as the original invention, by substantially the same means, is not such an invention as will sustain a patent, even though the changes of the kind may produce better results. Smith vs. Nichols, 21 Wall., 115. Effective support to the proposition that nothing but invention or discovery will entitle an applicant to a patent, is also found in the reported decision of the Circuit Courts, as appears from the following citations: Judge Story held, many years ago, that the mere application of an old process, machine or device, to a new use was not patentable; that there must be some new process, or some new machinery to produce the result, in order that the supposed inventor may properly have a patent for the alleged improvement." *Howe vs. Abbott*, 2 Story, 194; *Bean vs. Smallwood*, 2 id., 411; *Glue Co. vs. Upton*, 6 Off. Gaz., 842; 7 id., 648.

"Conclusive support to the proposition that an applicant for a patent is not entitled to the public protection, unless the supposed improvement involves actual invention or discovery, is found in the oft-repeated decisions of all the English courts having jurisdiction in such cases; and it is safe to remark, that the courts of that country apply the rule more readily, and with a much closer scrutiny than do the courts of this country exercising the like jurisdiction." *Ralston vs. Smith*, 11 H. L. C., 223; *Harwood vs. Railway Company*, 11 id., 654; *Gordon vs. Moore*, L. R., 1 C. P., 624; *Kay vs. Marshall*, 8 Cl. & Fin., N. S., 706; *Horton vs. Mahon*, 12 id., 437; *Ormson vs. Clarke*, 14 id., 475; *Parkes vs. Stevens*, L. R., 8 Eq., 358; S. C., L. R., 5 Ch. App., 36; *Envelope Co. vs. Seymer*, 5 C. B., N. S., 164; *White vs. Toms*, 17 Law Times, N. S., 319; *Ralston vs. Smith*, 11 C. B., N. S., 471; *Ormson vs. Clarke*, 13 id., 337; *Ralston vs. Smith*, 9 id., 117; *Saunders vs. Aston*, 3 Barn. and Ad., 881; *Seed vs. Higgins*, 8 El. & Bl., 743.

"For these reasons, we are all of the opinion that the claim of the improvement described as the employment or use of two deflecting plates, one placed on each side of the circular-saw, for the purposes set forth in the specification, is void, because it does not constitute a patentable invention!"

In *Terhune vs. Phillips*, 9 Otto, 592, the Court declared void letters patent, for want of novelty. The invention for which they were granted "has, for its object, to provide a means for connecting the ends of the horizontal and vertical members of a show-case frame; and to that end it consists in a metallic corner-piece, provided with sockets adapted to receive the ends of the different members, whereby the same are firmly connected at the corners of the case." The syllabus of the case is: "The Court will take judicial notice of a thing which is in the common knowledge and use of the people through the country. It therefore holds that re-issue letters patent, No. 5748, granted to Mathias Terhune, Jan. 27th, 1874, for an alleged new and useful improvement in corner sockets for show-cases, are void, for want of novelty."

What is there new in this claim?

It is not the upward inclination of the points.

It is not the diagonal-cut points.

It is not the diagonal cut on the same side of the two points.

It was common knowledge that the diagonal cut upon the point of the prong would tend to force the prong in the direction of the point, and out of a right line when the point was driven into wood. That if the points inclined upward, a force applied in the same direction would not pull the staple out as readily as if it was applied in the opposite direction, that if both points were cut diagonally on the under side, the points would be forced upward more or less when driven into wood. Yet the complainant seeks to monopolize the use of these well-known principles for seventeen years.

II.

Complainant's second claim is as follows: "*The convex metallic washer* c, *in combination with the compound bail fastening staple* d, *having upwardly penetrating points*, 2, 3, *and loop* 4, *as used for the purposes specified.*"

What is the invention here? The patentee puts a metallic washer on one of the points of the staple, between the bail and the pail, not to co-operate with the bail ear in the production of any one precise result, but to prevent the bail from rubbing the side of the pail. Did this require inventive genius? Did it require even mechanical skill?

In the celebrated case of Hailes vs. Von Wormer, 20 Wall, 353, the devices employed were held to produce no new effect, because used in combination; each produced its peculiar or appro-

priate function, unchanged by the operation of the others. The production of heat and illumination was not due, as the court substantially held, to the combination any more than it was in organisms in which one or more of those devices were omitted. In short it was a mere aggregation of devices, in which each performed its separate function without producing anything novel in operation or result by their combination. Does not the bail ear perform the same function without the washer as with it?

In Gidden vs. Copeland, 15 O. G. 921, C. D., the commissioner says: "The fact that the knives, the rake and the binder are, respectively, subordinate combinations, performing distinct operations, is not fatal to the patentability of the combination of these devices in a harvester, *for they all co-operate to produce one definite result. But the combination of a tool-chest or feed box with these other elements would not be a patentable combination, because whatever these appendages might contribute to the production of a convenient or useful harvester, they would not co-operate with the other devices in the production of any one precise result. So while the fire pot, cool reservoir, revertible flue, and light holes, described in the case of Hailes vs. Von Wormer, 20 Wall., 353, might all contribute to the* production of a good stove, they could not possibly contribute to any one distinct result."

In Rickendorfer vs. Faber, 12 Blatchf., 78, Judge Woodruff says: There was the pencil and here was the eraser. Each had its own holder or sheath. If he had spliced the two together for convenience in use, tying them with a cord, or fastening them with glue, would that have been a patentable invention? Would the man who first put two blades of a knife in one handle, instead of one only, be an inventor? And would he be any more so if one of the blades was a file, such file blades having been in common use in a like separate handle? If, to attain the utility and convenience which the union of two implements produces, something new in the construction of the implements, or some new device requiring thought or study, more or less, is necessary to unite them, such union may be patentable. *But here, each implement is constructed precisely as it was before, and the means of union was not in itself novel.* It was like the recent case before the Commissioner of Patents, in which the alleged invention consisted in uniting a putty knife and a glass cutter in the same handle.

When the functions and uses of each are unaffected by the union, and the means of uniting has no novelty, it is not obvious, certainly, that anything of invention can be alleged by the combined implements. *Sawyer vs. Bixby,* 9 Blatchford, C. C. R., 361. That the aggregated result may be very convenient, may, for that reason, be popular, and may find a ready sale, and that such sales are very large and show a great demand, does not determine the question.

As suggested in several cases relating to aggregation, as distinguished from patentable combinations, the aggregate result may be the production of a better structure, as an aggregate, than was ever before produced, and yet, for lack of novelty of device, or new result produced by the aggregation, and due thereto, it may have no patentable quality. *Hailes vs. Von Wormer*, 7 Blatchford, C. C. R., 443, affirmed in Supreme Court, 5 Pat. Off. Gaz., 89. *Sawyer vs. Bixby*, 9 Blatchford, C. C. R., 361. *Sarven vs. Hall*, id., 524, 539. *Ex parte Van Wagenen*, 1 Pat. Off. Gaz., 89. *Ex parte Prindle*, id., 404; *Ex parte La Duc*, id., 549; *Ex parte Morse*, 3 id., 467; *Mance vs. Adams*, 1 id., 1; *Ex parte Castle*, 4 id., 179.

Justice Matthews, in delivering the opinion of this Court in Pickering vs. McCullough, 104 U. S. R., 310, says: "It is perfectly clear that all the elements of the combination are old, and that each operates only in the old way. Beyond the separate and well-known results produced by them severally, no one of them contributes to the combined result any new feature; no one of them adds to the combination anything more than its separate, independent effect; no one of them gives any additional efficiency to the others, or changes in any way the mode or result of its action. In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other; to draw an illustration from another branch of the law, they must be joint tenants of the domain of the invention, seized each of every *part, per my et per tout*, and not mere tenants in common, with separate interests and estates. It must form either a new machine, of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions, otherwise it is only a mechanical juxtaposition, and not a vital union."

If no invention was necessary to combine these parts, describing the combination of them merely, describes no invention.

In conclusion, we say that complainant's patent is void, as to the first claim, that the changes made by complainant in the staple required no invention, and were merely the application of common knowledge to a staple for the use intended.

As to the second claim, because it is for a mere aggregation of parts, which have no common function.

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